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Nos. 21782 and 21782-A

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL REISMAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

## APPELLANT'S OPENING BRIEF.

BALL, HUNT, HART & BROWN,  
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**FILED**

**DEC 18 1967**

**WM. B. LUCK, CLERK**

**DEC 21 1967**





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Nos. 21782 and 21782-A  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

SAMUEL REISMAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLANT'S OPENING BRIEF.**

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**JURISDICTIONAL STATEMENT.**

The jurisdiction of the United States District Court, Southern District of California, Central Division, was based on 18 U.S.C.A. Section 3231. The jurisdiction of this court is based on 28 U.S.C.A. Section 1291. The indictment charging violations of 18 U.S.C. Section 1341, mail fraud, appears in the Clerk's Transcript of Record\* page 2.

**STATEMENT OF THE CASE.**

**The Indictment.**

Appellant Reisman was indicted in the United States District Court, Southern District of California, Central Division, for 79 counts of mail fraud under 18 U.S.C. Section 1341. Others charged in the same indictment

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\*The Clerk's Transcript of Record will be referred to as C. T. The Reporter's Transcript of Proceedings will be referred to as R. T.

were: Arnold Clejan, Joseph Benaron, Joseph J. Byrnes, Norman T. Rockel, Charles O. Escarzaga, Robert L. Stein, Maurice Weiss, Stanley J. Weiss, Frank L. Gillhouse, and Robert M. Jaffe. The indictment alleges in substance that beginning on or about June 9, 1959 and continuing until the return of the indictment, April 3, 1964, the defendants devised and executed a scheme to defraud purchasers of Nevada land known as the Gamble Ranch. The indictment charges that in connection with the sale of Gamble Ranch land certain false representations were made orally, in newspapers, motion pictures, slides, brochures, letters, and on radio and television. Each of the 79 counts is supported by a mailing allegedly made to execute the scheme.

### **The Verdicts.**

Appellant Reisman, Joseph Benaron, Joseph J. Byrnes, and Maurice Weiss were tried together in a jury trial that lasted thirteen weeks, from April 6 to July 2, 1965. Byrnes and appellant Reisman were found not guilty of count 6 and guilty of the other 78 counts [C. T. 1007; R. T. 14,950-14,954]. The jury found Benaron not guilty of count 6 but could not reach a verdict on the other 78 counts; as to those counts a mistrial was declared [R. T. 14,985-14,986]. The court granted a mistrial as to Maurice Weiss because he became ill during the trial [R. T. 14,305-14,306]. Various dispositions were made of the cases of defendants who did not go to trial. Appellant Reisman moved for judgment of acquittal or in the alternative for a new trial [C. T. 1018-21, 1025-33]. The court granted the motion for judgment of acquittal on counts 2 and 3



only, and denied the motion for a new trial [C. T. 1130]. Appellant Reisman appeals from the judgment of conviction [C. T. 1138-1139].

### **Summary of the Facts.**

Appellant Samuel Reisman is an attorney at law. He has practiced law in California since 1938. He has maintained his law office in the Citizens National Bank Building, 453 South Spring Street, Los Angeles, since 1943. His was primarily a trial, corporate and business type of practice in which he was quite successful. He had earned an excellent reputation as a citizen and as a lawyer [R. T. 12920-12929; 9532; 9535; 9592-L-3; 9949; 10,036; 10,115; 10,521; 13,959]. He had represented Joseph Benaron in various business ventures since 1946 or 1947. Before 1959 he had been an officer and director in several companies in which Benaron was interested. He acted as legal counsel rather than as a business executive for each of these companies [R. T. 12,920-12,921; 12,931-12,933].

Reisman first heard of the Gamble Ranch on September 7 or 8, 1959 when Benaron and Byrnes told him they each wanted to buy a 5% interest in the Ranch [R. T. 12,942-12,944]. The Gamble Ranch was located in Elko County in northeastern Nevada and consisted of over 600,000 acres. About 400,000 acres were owned by the Federal Bureau of Land Management and 236,000 acres were owned by B. M. Stewart. The Government owned alternate sections that formed a checkerboard with sections owned by Stewart. The Ranch was about 30 miles wide and 36 miles long. Its altitude ranged from about 3500 to 10,000 feet [R. T. 885, 894].

A Southern Pacific Railroad track bisected the Ranch. The town of Montello was located in the middle of the Ranch on the railroad. Northwest of Montello were the Ranch headquarters, housing areas, a feed mill and several reservoirs. At the headquarters some 5,000 acres of alfalfa and grain were grown. Electricity was brought in from Utah. Southeast of the railroad the only man-made improvements were three stock watering facilities and water pipeline. There were 50 to 70 reservoirs on the Ranch. The four principal reservoirs were Rock Springs Dam, 21 Mile Reservoir, Crittenden, and Dake [R. T. 889-893]. There were in excess of 100 springs, and in addition, a known water reservoir underneath most parts of the ranch property [R. T. 935-936].

Arnold Clejan bought the Gamble Ranch from B. M. Stewart in 1959 for \$2,500,000 which included the assumption of a \$300,000 first trust deed [R. T. 904]. On September 7 or 8, 1959 Benaron and Byrnes asked Reisman to draft an agreement whereby they would each buy from Clejan an undivided 5% interest in the Ranch. Reisman dictated a draft of an agreement. Since he was scheduled to leave Los Angeles for Europe he turned the matter over to Bertram Ross, a lawyer who shared offices with Reisman. Ross completed the transaction [R. T. 12,942-12,944, 10,617, 10,621-10,621-A, Ex. EH]. On September 16, 1959, when Reisman was in Europe, the California Division of Real Estate by letter asked Clejan to stop representing and selling Gamble Ranch land as commercial agricultural property. The Real Estate Division took the position that the land offered for sale did not qualify as commercial agricultural land and that therefore the sellers would have to

comply with the subdivision law and obtain a subdivision public report before making further sales [R. T. 4509-4510, Ex. AH]. Reisman returned from Europe on October 27, 1959. During his absence he had nothing to do with the Gamble Ranch. On November 6, 1959 the Real Estate Commission issued a formal cease and desist order [R. T. 12,942-1,944, Ex. 1-237].

When Benaron learned of the cease and desist order he asked Reisman to inquire about it from Clejan's attorney, Albert Allen [R. T. 12,951]. From Allen, Reisman learned that the Real Estate Commission objected to sales without a public report, in part to advertising material, and because Clejan was selling land encumbered by two mortgages. Allen took the position that the property was commercial agricultural land and therefore exempt from the requirement of the Subdivision Act that a public report be obtained [R. T. 12,953, 12,974-12,975, Exs. B and B-1]. After further investigation Reisman concluded that Allen's position was incorrect and that an application for a public report should be filed with the Real Estate Commission [R. T. 12,952-12,954]. At Benaron's request Reisman conferred a number of times with representatives of the Real Estate Commission and prepared and filed an application for a public report [R. T. 12,955, 13,048-13,049]. In December, 1959 Gamble Ranch Investments Company was formed. This company was a Nevada corporation. Reisman took no part in its incorporation. Benaron and Byrnes each exchanged their 5% interests in the land for 5% of the stock of the new company. Clejan exchanged his 90% interest in the land for 90% of the stock. Reisman prepared an agreement by which these exchanges were made [R. T. 12,963-



12,964, 12,977-12,978, Ex. FN]. On December 14, 1959 Reisman was elected president of the corporation; Benaron and Byrnes were elected vice presidents [R. T. 12,993].

Through December, 1959 and January, 1960 Reisman continued to represent the company in processing the application for a public report. He conferred with members of the Real Estate Commission. He submitted to the Commission material concerning the ranch: a water report prepared by civil and consulting engineers, letters concerning the availability of electricity, and other material. On January 5, 1960 Mr. Bircher from the Real Estate Division visited the Gamble Ranch and rendered a detailed report of his observations and conclusions. The Division reviewed the company's advertising and suggested changes that were made. A public report was issued on 40,000 acres southeast of Montello in February, 1960. As other sections of land were sold, other public reports were issued. Reisman's office represented the company in obtaining public reports from December, 1959 through the spring of 1962 [R. T. 12,999, 13,001, 13,011, 13,025-13047, Ex. CA, 13,048-13,050, Ex. A, 13,052].

Reisman acquired 2% of Gamble Ranch Investments Company stock in June, 1960. At the end of 1960 he bought more stock until he finally owned about 13% of the total [R. T. 13,054-13,057].

In 1960, Reisman reviewed the company's advertising material at Benaron's request. Some of the advertising was reviewed by Bertram Ross, the sole practitioner who shared offices with Reisman, and by Herbert Weiser, a lawyer employed by Reisman. The lawyers judged the brochures and other advertising by compar-

ing them to source materials that were provided them: pictures and reports in a book compiled by Previews, Inc. for B. M. Stewart for use in selling the Ranch to Clejan [Exs. 1-1128; 2-234]; documents from the Elko County Chamber of Commerce [Ex. 2-258]; letters from an agricultural expert [Ex. B-4]; a water report [Ex. 2-884], and other material [Exs. EJ 2-6, 2-114, 2-237, 2-870-B, 2-883, 2-883-KK-1, 2-885, 2-885-A, and 2-1248]. [R. T. 13,058-13,060, 13-083-13084]. Reisman made various changes in the advertising submitted to him. He testified that he deleted or changed anything he thought was misleading or untrue. In May, 1961 he advised a producer of radio and television commercials that all advertising "should be on a highly ethical plane." [R. T. 13,074-13,076, 13-110-13,111, 13,120-13,122, Ex. Q-1]. Advertising producers testified that Reisman made changes in advertising he considered improper [R. T. 1473-1475, 1490-1491, 1497-1498, Ex. 2-47, 1505-1507, 1630, 1635 (witness Beattie), 1174-1176, 1387-1388, 1318, 1389-1390, 1446-1447, Ex. 2-365 (witness Roche)].

In the latter part of 1961 the company decided to make a public stock offering to raise money for development of the Ranch. Reisman assisted in the preparation of the S-1 Securities and Exchange Commission Registration Statement [R. T. 13,191]. Reisman and Ross testified that on September 26, 1961 they went to the Real Estate Division to ask if the company was in good standing with the Division and whether the Division had received any complaints about the company. Reisman did not want to sell stock to the public if the company was not in good standing. Robert Schofield and Henry Block of the Real Estate Division

told Reisman and Ross that they had heard of no complaints and that the company had complied with all applicable regulations [R. T. 11,194-11,197, 13-193-13,197, Ex. EP].

Morris Cohon, a New York underwriter and securities broker and dealer, testified that on September 18, 1961 he sent to Gamble Ranch a letter of intent to underwrite the proposed stock issue [R. T. 10,145-10,146, Ex. EE]. Cohon later committed himself to a firm underwriting of \$2,500,000 [R. T. 10,098-10,099]. The firm commitment meant that the underwriter would own the stock. He would be obligated to pay the company \$2,500,000 even if he could not sell the stock [R. T. 10,113-10,114]. Cohon, a specialist in real estate ventures, concluded that the stock would be a fair financial offer to the public [R. T. 10,119]. However, the underwriting was never completed because the California Corporations Commissioner refused to issue a permit to sell the stock in California. Cohon could not underwrite the issue after the largest market for the stock had been eliminated. So the company did not receive the money for development [R. T. 10,141-10,142, 10,148].

Hundreds of letters of complaint and other communications from land purchasers were received in evidence. Reisman testified that the complaints or refund requests of only some thirteen purchasers came to his personal attention. The first was in July, 1961 [R. T. 13,157-13,189; Ex. FY], and the last in November, 1961 [R. T. 13,157-13,189; Exs. GH, GI, 1-632]. Only four were claims of misrepresentation [R. T. 13,165-13,189, Exs. FZ, 1-543, GB, GF, DI, 1-632, BF]. These purchasers were given refunds. A fifth letter



was from a prospective purchaser who had heard from a Nevada real estate official of misrepresentation by Gamble Ranch personnel. He was invited to the Ranch [R. T. 13,157-13,162, Ex. FY]. The other eight purchasers wanted to cancel their contracts for financial reasons. They were given refunds, different parcels of property, or were otherwise satisfied [R. T. 13,165-13,172, Ex. FZ; 13,171-13,176, Exs. GC, GD, GE, GF; 13,178-13,185, Exs. GG, GH; 13,189].

In January, 1962 the Nevada Real Estate Commission issued a publicity release saying that the company would refund money to all purchasers who wanted a refund [Ex. 3-2024]. The statement was incorrect. Following the article a large number of complaints or requests for refunds were made. Reisman was relieved as an attorney of the duty of handling complaints [R. T. 13,319-13,320]. For a short time in early 1962 the law firm of Wyman, Finell & Rothman handled these customer complaints and refund requests and decided whether to make refunds. Refunds were made to purchasers who claimed misrepresentation [R. T. 12,599-12,603]. Then Bertram Ross reviewed and disposed of all complaints until March, 1963. Ross was retained by Gamble Ranch as independent counsel for this purpose. He was paid for his services. He had no connection with Reisman in this function. He dealt with some 269 complaints during that period [R. T. 11,151, 11,165, 11,247-11,251, 13,320]. Another lawyer, Richard Allan Weiss, replaced Ross and handled complaints beginning in March, 1963 [R. T. 11,165].

The last public report was issued on April 23, 1962. At that time the Real Estate Division had no reason to stop Gamble Ranch sales [R. T. 7186-7188]. However,

shortly afterward, the Division advised the company that some misrepresentations were allegedly made by salesmen. In June, 1962 attorneys Wyman, Finell, and Ross met with representatives of the Real Estate Division to discuss the matter. Reisman was out of the country at that time. The lawyers agreed on behalf of the company to stop selling land until the problem was resolved. They agreed to sign a consent cease and desist order [Ex. 1-1125]. But all three lawyers testified that their clients would sign the consent decree only with the understanding that: it was not an admission of fraud or wrongdoing and would not be so construed; the Real Estate Division would not release the information to the news media [R. T. 14,017-14,027, 12,606-12,613, 11,192-11,194]. That testimony is uncontradicted. However, publicity was released in breach of this agreement within 24 hours after the agreement was made [R. T. 12,613]. And in the trial of this case the consent decree was admitted in evidence over defendants' objections for the purpose of showing an admission of fraud and wrongdoing [R. T. 6283, 6454, 5832, 12,632-12,635, 11,474-11,480, 11,493, 14,381-14,382, 14,780-14,781].

Through the early part of 1962 appellant continued to do legal work in connection with filing the Securities & Exchange Commission Registration Statement and the issuance of subdivision public reports [R. T. 13,302-13,307]. In June, 1962 appellant resigned as president of the company.

I.

THE COURT IMPROPERLY ADMITTED IN  
EVIDENCE, AND ADMONISHED THE JURY  
REGARDING, LETTERS OF COMPLAINT FROM  
LAND PURCHASERS.

Introduction.

Hundreds of letters written by dissatisfied purchasers of Gamble Ranch land were admitted in evidence. Copies of some of these complaint letters are attached for illustration in Appendices A, B, and C. The attached copies by no means exhaust the number of such letters. Most letters contain angry denunciations and charges of fraud and misrepresentation. All letters admitted in evidence were taken to the jury deliberation room for examination by the jurors. Many complaints were read in evidence. That such letters were highly prejudicial to the defendants cannot be disputed.

The court admonished the jury that the complaint letters were not admitted to prove the truth of their contents, but as to the purpose for their admission the court gave many different explanations. The admission in evidence of these complaint letters, and the court's admonitions as to the purpose for their admission, constitute reversible error under the recent decision of this Court in *Phillips v. United States*, 356 F. 2d 297 (9th Cir. 1965), which was followed in *Windsor v. United States*, ..... F. 2d ..... (9th Cir. 1967), No. 19,174.

The *Phillips* case sets out three requirements for the admission in evidence of complaint letters:

- (1) At the time the documents are offered the trial court must make a preliminary determina-

tion as to whether there is *prima facie* evidence showing that the defendant had actual, personal knowledge of the complaint letters.

- (2) The evidence must be sufficient to support a *prima facie* finding that the defendant had actual, personal knowledge of the complaint letters.
- (3) The trial court must admonish the jury in plain and direct language that complaint letters may be considered only if evidence independent of the letters themselves shows that the defendant had actual, personal knowledge of such letters.

If the record does not show compliance with these three requirements, the judgment of conviction will be reversed even though other evidence may amply establish defendant's guilt beyond a reasonable doubt. The trial court in the present case did not comply with these three rules.

**A. The Court Did Not Make the Necessary Preliminary Finding That Appellant Had Personal Knowledge of the Complaint Letters.**

*Phillips v. United States, supra*, involved a prosecution for mail fraud and conspiracy to commit mail fraud by making allegedly false representations to sell Oregon land. The facts are remarkably similar to the facts of the present case. Appellants were an attorney and two other persons who organized a corporation to develop and sell the land. As in the present case, the indictment charged that brochures and newspaper advertising contained false and misleading statements and



pictures. The land was represented to be “rich, fertile land . . . a fertile valley” with “boating, water skiing, golfing, swimming,” and to have “Four exciting seasons! 300 days of warm wonderful sunshine throughout the year.” The offer was described as a “sound investment opportunity” in “an area of booming population.” (365 F. 2d at 300). In fact, the property was vacant desert land. Photographs showed mountains, lakes, valleys and recreational scenes—all miles from the land for sale.

The trial court in *Phillips* admitted in evidence ten cancellation letters from dissatisfied customers and a group of order coupons from prospective purchasers. In the present case hundreds of complaint letters were received in evidence [See, *e.g.*: R. T. 5958, Exs. 3-296 to 3-414; R. T. 6337-6338, Exs. 3-415 to 3-550; R. T. 14,045, Exs. 3-2132 to 3-2134]. In *Phillips* only one short letter was read to the jury (365 F. 2d at 301, f.n. 1). The court summarized for the jury the other nine complaint letters. The jury was not permitted to see any of the remaining documents. In the present case, many complaint letters were read to the jury [See *e.g.*: R. T. 3803-3805-3808, Ex. 2-1172; R. T. 3786-3790, Ex. 2-1118; R. T. 5815, Ex. 3-862]. On occasion the Government attorney would offer a series of complaint letters and read selected documents, such as “every fourth or fifth file.” [R. T. 6370, 6338, Exs. 3-415 to 3-550, and particularly, *e.g.*, R. T. 6338-6363, Exs. 3-416, 3-419 to 3-423, 3-427, 3-429, 3-432, 3-438 to 3-440, 3-448, 3-459, 3-464, 3-488; R. T. 6370-6377,

Exs. 3-506, 3-543]. The Government attorney announced in the presence of the jury that he had made a list of complaint letters in a particular group that he wanted to read “and it came out 120” [R. T. 6370]. After reading selected letters, he said:

“I believe, your Honor, we may as well conclude with that. The others are of a similar vein” [R. T. 6376-6377].

All exhibits were removed to the jury deliberation room. The jurors had available for examination all complaint letters received in evidence.

The court in *Phillips* told the jury that the complaints and coupons were not to be considered for the truth of their contents but only on the question whether one or more defendants “knew” or had “notice” that advertising might be creating a false impression. The court did not explain that the knowledge required was actual personal knowledge of the particular defendant. Constructive knowledge is not enough; the knowledge of one person in the venture may not be imputed to another.\* (356 F. 2d at 305.) And before complaint letters are even admitted in evidence the trial judge must make a preliminary finding that there is *prima facie* evidence apart from the documents themselves that the defendant had actual, personal knowledge of the complaints.

“Where this is the theory upon which documents are admitted, the trial court should also, at the time the documents are offered in evidence, make a preliminary determination as to whether there is *prima facie* evidence showing such actual

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\*This point is presented in detail in argument C, *infra*.

knowledge. Lacking such prima facie showing the documents should not be admitted.” (356 F. 2d at 306, f.n. 8.)

The court on appeal will not presume that the trial court made the necessary preliminary determination either (1) from a record that is silent as to whether the determination was made, or (2) from the fact that the documents were admitted in evidence. In *Phillips* the court found, although the documents were received in evidence, that:

“No such preliminary determination was made in this case.” (356 F. 2d at 306, f.n. 8.)

No such preliminary determination was made in the present case. There is nothing in the record to show that the trial judge made the requisite preliminary finding of actual, personal knowledge. But this record is not silent as to whether the court made the determination; the record affirmatively shows that the court did not make the determination. The complaint letters were received in evidence because there was testimony that they were found in files kept “in the ordinary course of the company’s business.” They were admitted not because they came to the personal attention of appellant but because the court supposed they were business records.

The complaint letters were not business records under 28 U.S.C. §1732. In the *Phillips* case, the court said, at 307:

“At least as to the letters comprising exhibit 968 [the ten complaint letters], appellants are correct in asserting that these communications do not constitute business records within the meaning of sec-

tion 1732. They were not made in the regular course of the business of the company in whose files they were found—a showing which must be made to give application to the Business Records Act. Instead, they were letters, written by outsiders, addressed to the land company and, in three instances, to defendant Hall.”

Because the trial court received the complaint letters as business records, it could not have made the necessary preliminary determination that appellant had actual knowledge of the complaints. The court was not thinking about personal knowledge as a basis for admission of the letters. The court was concerned only with deciding whether the documents were kept in the ordinary course of business or were found in the company files. The record is replete with examples. The group of complaint exhibits marked 3-296 through 3-414 was received because the Government attorney said he had laid a foundation showing that they were business records of Gamble Ranch.

“The Court: Mr. Nissen, these are files that you say there has been testimony by at least one time president of the Gamble Ranch, that they were kept in the normal course of business?

Mr. Nissen: Yes, sir.

\* \* \* \* \*

The Court: Maybe some files were kept in the normal course of business and maybe some were not.

*If there was testimony these were kept in the normal course of business I will allow them in.”*  
[R. T. 5957-5958. Emphasis added].



The showing of materiality was not that the defendants had actual knowledge of the complaints but simply *that they were complaints*:

“The Court: What is the materiality?

Mr. Nissen: These are complaints and refunds files, sir, with letters from customers to and from, about their visits to the Ranch and so forth.

The Court: Ordered in evidence.” [R. T. 5958].

In a discussion between the court and counsel regarding the basis for admitting complaint letters, the court asked only whether the documents were kept in the ordinary course of business.

“Mr. Rothman: As I understood the basis of the court’s ruling, if it was from Gamble Ranch files that the foundation for the letters had been laid. \* \* \* \*

The Court: Is there any question about his file being kept in the regular course of business?

Mr. Rothman: No, I don’t have any question about his file being kept in the regular course of business.

The Court: That would be the question.” [R. T. 7512].

The court further held that documents were *relevant* if they qualified as business records. Regarding the admissibility of a letter from an unidentified person to Ranch Land, a company that had no connection with Gamble Ranch, the following discussion took place:

“Mr. Rothman: . . . I cannot see how that letter can possibly be relevant as to these defendants.

The Court: . . . If it is a letter in the file of Gamble Ranch and the file has been—the foundation has been laid, that the file is kept in the normal course of business, I think it can be considered.” [R. T. 4443].

The “business record” foundation was established at one time for hundreds of complaint letters and files. The court had only to be satisfied that the complaints “. . . are records of the Gamble Ranch . . . [k]ept in the normal course of their business.” [R. T. 6337, Exs. 3-415 to 3-550]. The admission of the complaints cannot be justified under the Business Records Act (*Phillips v. United States, supra*, 356 F. 2d at 307). As in the *Phillips* case, the court here did not make a preliminary determination that there was *prima facie* evidence showing that appellant had actual, personal knowledge of the complaints. The court’s only inquiry was whether the complaints were found in company files. “Lacking such *prima facie* showing, the documents should not be admitted.” (*Phillips v. United States, supra*, 356 F. 2d at 306, f.n. 8). The error was manifestly prejudicial to appellant. The jury was permitted to consider hundreds of inflammatory charges on the question of appellant’s intent although it was never shown or decided that he had actual knowledge of them. For this substantial error, the judgment of conviction should be reversed.

**B. The Evidence Is Insufficient to Show That Appellant Had Actual, Personal Knowledge of the Complaint Letters.**

A defendant's actual knowledge of complaint letters may be established by circumstantial evidence. But there must be "substantial evidence that a particular defendant knew of these letters or requests while the venture was still in progress." (*Phillips v. United States, supra*, 356 F. 2d at 305; accord see *Windsor v. United States*, ..... F. 2d ..... (9th Cir. 1967), No. 19,174). There is no substantial evidence in this case to show that appellant had actual knowledge of the complaint letters.

**Complaints Reviewed by Appellant.**

Appellant testified that of all the complaint or refund letters admitted in evidence he had actual knowledge of only thirteen. There is no evidence to contradict appellant's testimony. Appellant dealt with the first complaint or refund request in July, 1961 and the last in November, 1961. Only four were claims of misrepresentation:

- (1) Gloria was given a full refund after appellant asked that there be immediate investigation of the matter [R. T. 13,165-13,172; Exs. FZ, GB, 1-543].
- (2) Hempstead rescinded his contract and was given a full refund [R. T. 13176-13178; Ex. GF].
- (3) Munson was given a full refund after appellant asked the Gamble Ranch general manager to "please see that the matter is handled immediately and to the customer's full satisfaction." [R. T. 13182-13184; Exs. G-1, 1-632].

- (4) McCann received a full refund [R. T. 13188-13189; Ex. BF].

A fifth purchaser did not claim that Gamble Ranch personnel had made misrepresentations to him:

- (5) Salamone wrote that he had been told by Nevada officials that the Gamble Ranch Company had misrepresented the property. Salamone was invited to visit the Ranch [R. T. 13157-13162; Ex. FY].

The other eight purchasers wanted to cancel their contracts for financial or other reasons. They did not claim misrepresentation. These eight were either given refunds or their requests were handled in some other satisfactory manner:

- (6) Lopez was unable to make payments. He was given a smaller parcel [R. T. 13165-13172; Exs. FZ, GA, GB, 1-543].
- (7) Weidemann moved to Ohio and wanted to rescind. The record does not show what final disposition was made [R. T. 13165-13172; Exs. FZ, GB, 1-543].
- (8) Ferrari thought he was overcharged so he was given a discount [R. T. 13172-13174; Ex. GC].
- (9) Fandrich had financial problems and wanted land in a different location. The company made an exchange of land [R. T. 13174; Ex. GD].
- (10) Cantu was inadvertently sold a parcel of land that had already been sold to someone else. He was given a full refund [R. T. 13174-13176; Ex. GE].



(11) Miller's property was being sold again by a Gamble Ranch Salesman at Miller's request [R. T. 13178-13179; Ex. GG].

(12) and 13)

Arthur and Ruppel could not make payments. The record does not show the disposition of their refund requests [R. T. 13179-13182; Ex. GH].

There is no evidence that appellant had actual knowledge of any other complaint letters. Indeed, the evidence affirmatively shows that appellant did not review or have knowledge of other complaints. Appellant last reviewed complaint letters in November, 1961 [Ex. GH, GI, 1-632]. The uncontradicted evidence shows that complaints were thereafter specifically assigned to other persons for review and processing [R. T. 13,320].

**Complaints Reviewed  
by Attorney Finell.**

In early January, 1962 the Nevada Real Estate Commission issued an incorrect publicity release saying that Gamble Ranch would refund money to any dissatisfied purchaser of land [See, *e.g.*, Ex. 1-1026]. Following that news, the company was flooded with complaints and refund requests. Because of the vast number of letters, the company had to formulate guidelines to determine when to give and when to refuse refunds. For this purpose Mr. Marvin Finell of the law firm of Wyman, Finell and Rothman was retained. Finell handled complaints in early 1962. He established standards for deciding whether to give a refund. Refunds were given only if the purchaser claimed the land had been misrepresented. After Finell established a pattern for handling complaints he told defendant Byrnes they

could be processed by someone in the Gamble Ranch office [R. T. 12,599-12,603]. There is no evidence that any such complaints were reviewed by appellant.

The group of complaints marked Exhibits 3-296 to 3-414 were for the most part sent in January, 1962. The complaints were sent to the Gamble Ranch office on Wilshire Boulevard in Beverly Hills. Norman Rockel, Gamble Ranch General Manager in 1961 and early 1962, testified for the Government that he forwarded complaints to Finell's office, Finell decided whether to give a refund, then Rockel sent the customer a form letter answering the complaint in accordance with Finell's decision [R. T. 5508-5509]. All complaints and refund requests were sent to Finell in early 1962 [R. T. 5755]. This testimony is uncontradicted. There is no evidence that appellant Reisman reviewed or had actual knowledge of complaints received in early 1962.

Examples of some of the complaints that followed the January, 1962 publicity, most of which were sent in January, 1962, are collected in Appendix A [See *e.g.*, Exs. 3-305, 3-306, 3-308, 3-346, 3-355, 3-362, 3-383, 3-391, 3-393, 3-393, 3-401, 3-402]. These complaints bear the Gamble Ranch Beverly Hills office "received" date stamp. Appellant's office has been at 453 South Spring Street, Los Angeles, since 1943 [R. T. 12923]. It had no connection with the Gamble Ranch Beverly Hills office. There is no evidence from Gamble Ranch office personnel or anyone else that appellant ever went through the Gamble Ranch office files to review complaints. It is clear from the evidence that appellant did not review complaints after November, 1961. Appellant would have had no reason to review complaints at the same time another lawyer, Finell, was doing so.

Finell's office was in Beverly Hills. It is hardly necessary to point out that appellant had no access to Finell's office files.

Despite the uncontradicted evidence, adduced by the Government as well as by the defendants, that in early 1962 all complaints were reviewed and handled by independent counsel, and that during this period appellant did not review complaints, these highly prejudicial letters were admitted for consideration against appellant. During this trial appellant was charged with knowledge of complaints contained in letters he never saw. Following are just a few examples: "I think I was cheated" [Ex. 3-308]; "Tonight as my husband and I were watching the news on television, *we were shocked at the words that came over the airwaves. Gamble Ranch is a Fraud!*" [Ex. 3-344]; "I feel that the property has been grossly misrepresented" [Ex. 3-401]; ". . . the property was misrepresented to me" [Ex. 3-402]. (Collected in Appendix A). Hundreds of similar letters were received against appellant. Some of these complaints are summarized under point C, below.

By a view of the evidence most favorable to the Government, the evidence affirmatively shows that appellant did not have actual knowledge of these complaints in early 1962. There is no evidence to support either a *prima facie* finding (*Phillips v. United States, supra*, 356 F. 2d at 306, f.n. 8), or a jury conclusion, based on substantial evidence, that appellant had actual, personal knowledge as required (*Phillips v. United States, supra*, 356 F. 2d 305). Because these letters were improperly admitted against appellant, the judgment of conviction should be reversed.

**Complaints Reviewed  
by Attorney Ross.**

There is a conflict in the evidence as to when Finell stopped reviewing complaints. The conflict does not concern appellant, however. There is no evidence that appellant reviewed or had knowledge of complaints at any time after November, 1961. The only question is when Finell stopped handling complaints and when Bertram Ross, the lawyer who shared office space with appellant, began to handle them. Finell testified that he processed complaints beginning in January, 1962 and continuing for some two to four weeks. After a pattern of complaints and standards for dealing with them had been established, Finell told defendant Byrnes that someone in the Gamble Ranch office could handle complaints [R. T. 12,602]. Rockel, the office manager in early 1962, testified that Finell made final decisions on refunds during February, 1962 [R. T. 5508-5509]. John W. Carey, a certified public accountant who succeeded Rockel and served as office manager from April to November, 1962, said that complaints were referred to Finell as late as April 1962 [R. T. 6253-6354, 6257]. Ross testified he was employed as counsel in July, 1962, to review complaints and handle refund requests. In that capacity he served until March, 1963 and was entirely independent of appellant [R. T. 11,151, 11,165, 11,247-11,251]. Carey testified that Ross "was substituted for Mr. Finell" [R. T. 6259]. And Ross said that complaints "were handled by Mr. Wyman's office [*i.e.*, Wyman, Finell and Rothman] up until the time I took the complaints over" [R. T. 11,164]. Altogether Ross



handled about 269 complaints and ten or twelve lawsuits brought by purchasers [R. T. 11,248-11,251; Ex. ER; Exs. 3-415 to 3-550; see examples in Appendix B]. Another attorney, Richard Allan Weiss, ultimately took over the handling of complaints from Ross in 1963 [R. T. 11,165].

Irrespective of the date Ross replaced Finell, the evidence clearly shows that appellant did not handle complaints in 1962 or 1963. At all times during 1962 and 1963 the company retained counsel for the purpose of processing complaints and refund requests. Ross shared offices with appellant. Sometimes appellant and Ross associated with each other on specific cases. But they were not partners. Appellant has never had a partner in the practice of law [R. T. 12923-12926]. It is not reasonable to assume that appellant went through Ross' files and looked at the complaint letters referred to Ross. There is certainly no evidence that he did. Nor is there any evidence that appellant at any time examined complaint letters in the Gamble Ranch office file in Beverly Hills. Appellant had no reason to examine or know of complaints that were being handled by other lawyers. The only evidence on the question is appellant's testimony that the only complaints or refund requests he saw were the thirteen he reviewed in 1961 [R. T. 13189]. As with the complaints reviewed by Finell, there is neither *prima facie* evidence nor substantial evidence that appellant had actual personal knowledge of complaints handled by Ross. Their admission in evidence against appellant was prejudicial error.

**C. The Court Erred Because It Did Not Admonish the Jury That Complaint Letters Could Be Considered Against Appellant Only if Independent Evidence Showed He Had Actual, Personal Knowledge of Such Letters.**

In *Phillips v. United States, supra*, the trial court received in evidence ten cancellation letters from dissatisfied land purchasers and a group of order coupons from prospective customers. The court read only one letter to the jury and summarized the other nine (356 F. 2d at 301, f.n. 1). The jury was not permitted to see any of the exhibits but the one read by the court. The court admonished the jury:

“By that, members of the jury, I mean anything that is stated in the letters in this particular exhibit is not to be considered by you as to the truth of the statements therein made, in that those persons are not here for cross examination. They are to be considered by you only as to the question of any more of these defendants, if any, having notice of any complaints that might have been made with reference to the particular property here in question [sic]. Only for that purpose may they be considered.” (356 F. 2d at 304, f.n. 5).

After the court in *Phillips* summarized the nine complaint letters, it told the jury that they had been summarized:

“... only in connection with your consideration of whether one or more of the defendants knew that the advertising material might be creating a false impression in persons who might be interested in the purchase of the property as advertised.” (356 F. 2d at 305).

On appeal, this Court held that even the above admonitions were not sufficient. It is not enough to tell the jury that complaints may be considered if the defendant “knew” or had “notice” of them. The court must tell the jury in unmistakable terms that there are *two distinct determinations* to be made:

(1) The complaints *cannot be considered at all, for any purpose*, unless the jury finds from evidence *independent* of the complaints themselves that a particular defendant had actual, personal knowledge of them.

“... the jury should be told in plain and direct language, that such documents may be considered *only if* it has been *independently* shown that such defendant had *actual knowledge* of the documents while the asserted scheme was in progress.” (*Phillips v. United States, supra*, 356 F. 2d at 306. Emphasis added).

The court must make it clear that a defendant cannot be charged with “constructive” knowledge. The knowledge of another in the venture cannot be imputed to the accused.

“... a conspirator’s intent to defraud may be inferred from the fact that he personally knew that the venture was operating deceitfully. But since it is the personal knowledge of the invidious fact which warrants such an inference, *nothing less than personal knowledge of that fact* will do to establish the fact even circumstantially. Thus so-called ‘constructive’ notice or knowledge of a circumstance, based upon the actual knowledge of a co-conspirator, agent or

employee, has no tendency, circumstantially or otherwise, to prove criminal intent.” (356 F. 2d at 303. Emphasis added).

(2) *Only if* the jury has found from independent evidence that a defendant had actual, personal knowledge of complaints may such complaints be considered. Only then does the jury reach the question of *how* to consider complaints. The court must tell the jury that if this second step is reached the complaints may not be considered for the truth of their contents but only in connection with whether a defendant knew that advertising might be misleading. (*Phillips v. United States*, supra, 356 F. 2d at 305).

The trial court in the present case, as did the court in the *Phillips* case, completely eliminated the first step. As each complaint exhibit was received in evidence the court instructed the jury only as to the purpose for which the complaint *could be considered*. The court said they were received “not for their truth.” But the court never told the jury that complaints *could not be considered at all* unless the jury found from independent evidence that a particular defendant had actual knowledge of the complaints. The court in *Phillips* refused to speculate whether the jury “could have found that each of the appellants had actual notice of the documents.” (356 F. 2d at 304). The omission in the admonitions of the necessary preliminary step is reversible error. *Phillips* was followed in *Windsor v. United States* (9th Cir. 1967), ..... F. 2d ....., No. 19,174, where this Court reversed the conviction of an attorney for mail fraud in the sale of land be-



cause of insufficient evidence that the accused had actual as distinguished from constructive knowledge of customer complaints.

In the present case the court gave a variety of instructions as to *how* complaints were to be considered. At no time did it properly advise the jury on the question of *whether* they could be considered. Some admonitions were nearly identical to those found erroneous in *Phillips*. In such cases the court told the jury that the complaints could be considered if defendants “knew” or had “knowledge” of them. For example, the court received in evidence Exhibits 3-296 to 3-414 (complaints reviewed by Attorney Finell) as “business records” [R. T. 5957-5958] and then told the jury that they were not admitted for the truth of what they assert, but:

“The complaints are relevant on the issue of the defendants’ intent and good faith.

“If the defendants *knew* that people were being misled by solicitation literature and salesmen’s representations and continued the same operation with this *knowledge*, this is a matter that the jury may consider in determining whether the defendants or any of them had any intent to defraud.” [R. T. 6031-6032. Emphasis added].

The admonition has the same vice as the instruction in *Phillips*. The words “knew” and “knowledge” permit the inference that constructive knowledge is sufficient to prove criminal intent. The following language from *Phillips* governs such an instruction:

“As the above-quoted portion of this instruction indicates, the jury was told that it should consider

these impressions only in connection with the jury's consideration of whether one or more of the defendants 'knew' that the advertising material might be creating a false impression. The court, however, did not explain that this would have to be actual knowledge based upon *substantial evidence* that a *particular defendant* knew of these letters or requests while the venture was still in progress. Under the instruction given, the jury could have attributed knowledge to one or more of the appellants concerning the documents, because *another appellant*, or an *acquitted defendant*, or the land company, escrow company, or the Bardwells (who were not defendants) had actual knowledge of such documents." (356 F. 2d at 305. Emphasis added).

In *Phillips*, the court thought the jury might construe the words "notice" or "knew" to include constructive knowledge. The danger of such a construction is far more real in the present case. On several occasions the court actually told the jury that defendants' knowledge could be proved constructively. When the Government offered Exhibit 3-352 the following colloquy took place between the Government attorney and the court in the presence of the jury:

"Mr. Nissen. May I state for the record, your Honor, that anything that is a statement of someone else, reported to *Gamble Ranch* or to any of *their personnel*, is offered for this reason: To show that the information was so reported and that *Gamble had that information in their file*.

The Court: Yes." [R. T. 4834. Emphasis added].

The court then instructed the jury accordingly:

“The Court: . . . Ladies and gentlemen, you should understand that, that anything in these communications said by the writer of these communications to have been told to him by someone else is not offered for the truth of what this person said to the writer of the letter.

It is only offered to show that information was passed on *to Mr. Stein or someone else in the Gamble Ranch organization.*” [R. T. 4834-4835. Emphasis added].

The statement of the Government attorney and the court’s instruction plainly advised the jury that complaints could be considered if—or because—they (1) were found in a company file; or (2) they came to *someone* in the company. There is no mention that appellant must have had knowledge of the complaint. This was unequivocally an instruction on constructive intent. The instruction left no doubt that the documents could be considered against appellant because they were in a company file or because they were “passed on” to “someone” in the organization. The following language from *Phillips* is particularly pertinent to this kind of instruction:

“The court, however, did not explain that this would have to be actual knowledge based upon substantial evidence that a particular defendant knew of these letters or requests while the venture was still in progress. Under the instruction given, the jury could have attributed knowledge to one or more of the appellants concerning the documents, because *another appellant*, or an *acquitted defend-*

*ant*, or *the land company*, *escrow company*, or *the Bardwells* (who were not defendants) had actual knowledge of such documents.” (356 F. 2d at 305. Emphasis added).

\* \* \*

“... so-called ‘constructive’ notice or knowledge of a circumstance, based upon the actual knowledge of a *co-conspirator*, *agent* or *employee*, has no tendency, circumstantially or otherwise, to prove criminal intent.” (356 F. 2d at 303. Emphasis added).

There were many other instructions that invited the jury to find appellant guilty because the company or someone else had notice of complaints. A striking example is the instruction given after the complaint file marked Exhibit 2-432 was received in evidence. The court told the jury:

“Ladies and gentlemen, here again this statement as to the complaint is not evidence—it is not offered for the proof—it is not admitted, at least for the proof of the statement, but to show that this complaint *was received by the company*, and you can consider it in considering the information the *company* had relative to complaints, *and intent*” [R. T. 8943. Emphasis added].

When the court received in evidence Exhibit 1-689, it told the jury in unmistakable language that the document could be considered on the question of defendants’ intent *if it came to the attention of the company*:

“The Court: . . . Ladies and gentlemen, this is only admissible insofar as it *came to the attention of Gamble Ranch*, and you can consider it in rela-



tion to the question of *intent on the part of the defendants*. But it is not admissible, and it is not being admitted for the truth of the facts set forth in the Better Business Bureau statement.

As I understand it, the statement was directed to Gamble Ranch and it was received *by Gamble Ranch*, and then they replied thereto.” [R. T. 8867-8868. Emphasis added].

This court in *Phillips* pointed out that at the trial the Government did not contend that defendants had actual knowledge of the complaints and coupons, and that the court admitted the documents on the theory of constructive notice (356 F. 2d at 306). The same is true in the present case. The Government took the position that complaints were admissible against the defendants because the company or someone in the company had notice of them, or because the complaints were found in company files. The court agreed with the Government’s position. The court held that defendants were bound by notice received by someone else. The positions of the court and of the Government were made clear when the Government offered a series of complaint letters sent to Robert McDonald, a Nevada attorney retained by Gamble Ranch [Exs. 3-2051, 3-2060, 3-2059-A, 3-2063, 3-2057, 3-2047, 3-2062, 3-2063, 3-2044, 3-2048, 3-2049, 3-2053, 3-2054, 3-2056. Admitted, R. T. 7528]. As to whether knowledge by McDonald of the complaints could be imputed to the defendants, the court and counsel had the following discussion:

“The Court: Yes, but if he was acting at the instructions of the company, why, it seems to me

he is then acting *as an agent*, unless you have some authority to the contrary.

He is employed by the company to act and he is acting for the company in these capacities as I understand it.

Mr. Rothman: And he receives a letter from an attorney, for example.

The Court: He receives a letter from an attorney, for example.

Mr. Rothman: Yes. Unless there is some evidence, it seems to me, *that knowledge was conveyed to these defendants*—these defendants are not the defendants that hired him.

These defendants are individual defendants, they are not the corporation.

The Court: Then the *whole question is whether the attorney is an agent of the company* and when the company employs him to answer complaints, it seems to me *they are bound by the notice he receives.*" [R. T. 7514-7515. Emphasis added].

\* \* \*

"The Court: . . . However, any of these complaints that came in are not admitted for the truth of the facts contained therein.

Mr. Nissen: They are offered by us, your Honor, to show number one, that the statement was made *to the company* and therefore *they had notice* a complaint was made.

The Court: That is right.

Mr. Nissen: That is the reason.

The Court: *They had notice* of the complaint . . ." [R. T. 7517. Emphasis added].

On another occasion the Government attorney made it plain that he was offering complaint evidence on a theory of constructive notice:

“Mr. Nissen: . . . You see, what we are calling these witnesses for is intent. If, say, five or six witnesses in a row understood the Dukane film strip to say something and they went up there and saw it was not as the film strip said, and perhaps *complained to the company*, as we think these witnesses will show, complained to Mr. Benaron’s, Byrnes’ and Reisman’s *representatives*—in fact, *some* of the complaints even being referred *perhaps* to them—then *you have* notice these things aren’t right.” [R. T. 2300-2301. Emphasis added].

Thus, the Government sought to prove a kind of vicarious criminal intent. The Government had no proof that appellant or the other defendants had actual knowledge of the complaints. The Government attorney speculated that “some of the complaints” were “perhaps” referred to the defendants. But the basis for introducing the complaints was the Government’s contention that the knowledge of “someone in the company,” or of defendants’ “representatives,” or of the Nevada attorney for the company, or merely of “the company,” could be imputed to defendants to establish their criminal intent. The court agreed with the Government’s constructive notice theory. The court’s instructions invited the jury to find appellant and the other defendants guilty because of the intent or knowledge of others. It is too late for the Government to argue that the

jury might conceivably have found that appellant had actual knowledge of the complaints:

“In view of the fact that no appropriate instruction was given on the subject of actual notice and, indeed, that the exhibits in question were not offered and received on such a theory, it is not now open to the Government to contend, alternatively to its constructive notice theory, that exhibits 968 and 984 [the complaints and coupons] were admissible because the jury could have found that each of the appellants had actual knowledge of them.

“We therefore hold that the court erred in admitting these exhibits.” (*Phillips v. United States, supra*, 356 F. 2d at 306).

In some of its instructions the trial court actually told the jury that complaints *did* come to the attention of the defendants. When the court admitted Exhibits 3-415 to 3-550 [R. T. 6337-6338, complaint files reviewed by Attorney Ross], it told the jury:

“The Government offers them as evidence of *the fact that* these complaints *came to the attention* of the defendants.” [R. T. 6333. Emphasis added].

\* \* \* \*

“Now these are offered, as I have already told you, I think on more than one occasion, not for the truth of the facts set forth in the complaints but to show *as evidence of the fact that these complaints were called to the attention* of the defendants, and the jury is to consider them as to the intent of the defendants to defraud or misrepresent.” [R. T. 6337-6338. Emphasis added].



Here the court instructed the jury that the complaints *did* come to the attention of the defendants. The court took from the jury the question *whether they did* come to the defendants' attention. The instructions are plainly erroneous.

“. . . the jury should be told in plain and direct language, that such documents may be considered *only if* it has been *independently* shown that such defendant had *actual knowledge* of the documents while the asserted scheme was in progress.” (*Phillips v. United States, supra*, 356 F. 2d at 306. Emphasis added).

The court's instructions deprived appellant of a jury determination on the issue of his personal knowledge. In addition, the jury was told that the *complaints themselves* were evidence of “the fact that these complaints *were*” (emphasis added), called to the attention of defendants that because there were complaints, the defendants knew of them. That is not the law. Complaints may be considered only “if it has been *independently* shown that such defendant had actual knowledge of the documents. . . .” (*Phillips v. United States, supra*, 356 F. 2d at 306. Emphasis added). And the language “came to the attention” of the defendants, like the words “know,” or “notice,” or “knowledge,” allow the jury to impute to defendant the knowledge of another person in violation of the principles set forth in the *Phillips* case.

There are numerous other examples of the same kind of instruction. In connection with Exhibits 3-415 to 3-550, the court further said:

“These complaints are being admitted to show that these complaints *came to the attention* of

these defendants. That is what the Government is offering them for, *as evidence of that fact.*" [R. T. 6335. Emphasis added].

Again the court told the jury that the complaints themselves are evidence that the defendants had knowledge of them. The erroneous phrase "came to the attention of the defendants" was used many times [See, *e.g.*, R. T. 5957-5959, Exs. 3-296 to 3-414; R. T. 8867-8868, Ex. 1-689].

As mentioned above, in *Phillips* only one short complaint letter was read in evidence (356 F. 2d 301, f.n. 1). The other nine complaints were summarized by the court and the jury was not permitted to see them. In the present case there were hundreds of complaint letters. The letters admitted contained accusations of fraud and misrepresentation in language far more caustic than that in the one letter in *Phillips*. Here all complaints were taken to the jury deliberation room for inspection by the jury. Many were read in evidence [See, *e.g.*: R. T. 3803-3805, 3808, Ex. 2-1172; R. T. 5815, Ex. 3-862; R. T. 3786-3790, Ex. 2-1118; R. T. 6338-6363, Exs. 3-416, 3-419 to 3-423, 3-427, 3-429, 3-432, 3-438 to 3-440, 3-448, 3-459, 3-464, 3-488; R. T. 6370-6377, Exs. 3-506, 3-543]. Appellant's "criminal intent" was proved by such letters although there is no evidence that he ever saw them. The jury was told that appellant could be found guilty of criminal fraud because someone else had seen them. Following are excerpts from only a few of the letters that the jury was permitted to consider against appellant:\*

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\*These excerpts are printed verbatim with no attempt to note mistakes made in the original letters.

“I have just returned from a visit to the town of Montello, Nevada, to see about the property that I had purchased and I feel that I have been a victim of a first grade fraud. This is a misrepresentation of your advertisement and brochures that were shown to me by your salesman, who magnified this transaction out of proportion with distorting facts, pamphlets, and movies.

So, after viewing the property and talking to the local residences of Montello and Wells, Nevada concerning my investment I am taking legal action at once, as I do not intend to continue with this farce any further. . . .” [Ex. 3-2132; Appendix C; Purchaser Gimenez].

“Pursuant to information in the July-August 1962 issue of ‘Real Estate Bulletin’ as follows ‘Brought into court, Johnston pled guilty, was fined \$525.00 and given a 60-day suspended sentence, concurrent with a judicial order to refund all purchase or deposit moneys upon buyer’s requests, etc.

We previously requested refund after having made the trip to the Gamble Ranch and discovered how much it had been misrepresented to us. . . .” [Ex. 3-2132; Appendix C; Purchaser Baker].

“Because the true conditions of water and electricity were misrepresented to us as buyers, I feel that this investment does not warrant further monies. . . .” [Ex. 3-2132; Appendix C; Purchaser Alimonda].

“We have received a statement, upon request, from the BBB, and found it to be a bad investment.

The property was misrepresented to us. Therefore we have a legal right to have all money refunded. . . .” [Ex. 3-2132; Appendix C; Purchaser Araque].

“ . . . we feel that the salesman had made misrepresentations by stating that the soil was rich, fertile soil and water could be obtained at 8 to 20 feet. . . .” [Ex. 3-2132; Appendix C; Purchaser De Marco].

“ . . . All I can tell is that we’ve been taken!

Where money is concerned, we can get pretty blown up, either you show us positive proof of what has been said on your side is true and I mean the whole bit or we too can be funny.

Please prove to us that it is not a fraud, for we had as honest intentions in buying as we hope you had in selling.” [Ex. 3-2132; Appendix C; Purchaser Donovan].

“ . . . Each of my clients feels that there has been a fraud practiced upon them in this matter, and we are informed that your Honorable Commission has declared that the sale of the Gamble Ranch, or portions of the Gamble Ranch, constituted misrepresentation, if not fraud, and that you had ordered them to refund the money that each of the respective purchasers had paid in. . . .” [Ex. 3-2132; Appendix C; Attorney Mackay].

“ . . . I just wonder what and how can we have any faith in this deal when we read a number of times in leading newspapers where your salespeople have misled others. . . .” [Ex. 3-2132; Appendix C; Purchaser Bishara].



“... It's too bad that we have so many dishonest people in our country that will go to no ends to fraud other people out of their money. . . .” [Ex. 3-2133; Appendix C; Purchaser Tresser].

“... We recently went to see our land and found it quite a joke compared to the brochures we have that the salesman left.

We want our money back and we aren't going to make trips to your office either as its just something to waste time. Unless we get some satisfaction I'm going to write to the Editors of Times Newspaper (whose article I still have) who stated your company would make refunds. If that doesn't seem effective there are other ways. . . .” [Ex. 3-2133; Appendix C; Purchaser Oldoerp].

“... Recently I have read too many articles in the California and Nevada papers concerning said land. Do you know this is fraud-misrepresentation of land, etc. and you know what happens to people that makes such rash statements? . . . I am an honest woman and this hurts me deeply to find so many dishonest people in the world. . . .” [Ex. 3-2133; Appendix C; Purchaser Winter].

“... We have seen the property and we are disappointed in this whole matter has been misrepresented by your Investment Counselor that sold this property to us their is a few more property owner that we are going to get together if our money is not returned to us that we have put into this land plus interest and charges. I like to say that we are going to get the backing of State Real Estate Commissioner Wynne A. Savage I have a copie of this letter I would like too here from your

lawyer as soon as possible so I may use this money in a good Investment.

I like to say there is at least a half dozen of us is going to get together to fight if we half to and I hope before were all through we half a lot more on our side. . . ." [Ex. 3-2133; Appendix C; Purchaser Verna].

". . . You and I both know there was misrepresentation as to water—(there is no question on that—you lost a case recently and that was one of the reasons). Shall I go on?

This is our last request for a refund, before seeking legal advice." [Ex. 3-2134; Appendix C; Purchaser Killalea].

Hundreds more complaint letters were received in evidence, all on a constructive notice theory. At no time did the court give the required admonition that the complaints could be considered only if evidence independent of the letters themselves showed that the particular defendant had actual, personal knowledge of them. The errors of the trial court are prejudicial and result in reversal without regard to the sufficiency of other evidence pointing toward guilt. Appellant therefore does not argue the sufficiency of the evidence in this appeal. The court in *Phillips* reversed the judgments of conviction even though:

"The record indicates that there is ample evidence to find appellants guilty beyond a reasonable doubt." (356 F. 2d at 306-307).

The decision of this Court in *Phillips v. United States*, reaffirmed in *Windsor v. United States* (9th Cir. 1967), .... F. 2d ...., No. 19,174, should be followed and the judgment of conviction should accordingly be reversed.

II.

APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND DENIED DUE PROCESS OF LAW BY REASON OF SUPPRESSION OF EVIDENCE IN THE POSSESSION OF THE PROSECUTOR WHICH WOULD HAVE BEEN USEFUL TO THE DEFENSE.

A. The Evidence Suppressed Consisted of California Division of Real Estate Files and Answers to Government Questionnaires in the Possession of the Prosecutor. These Documents Were Requested by the Defense, and the Trial Court Sustained the Prosecutor's Objection to Producing Them. If Produced, These Files and Answers to Questionnaires Would Have Disclosed Evidence Material to the Issue of Guilt or Innocence; They Would Have Provided Information Which Would Lead to the Discovery of Material Evidence; and They Would Have Been Useful to the Defense in Cross-Examining Government Witnesses.

There are two categories of evidence which the prosecutor refused to disclose to the defense. The refusal constituted a suppression of evidence. One category is the investigative files of the Division of Real Estate of the State of California, and the other is answers to government questionnaires. These documents were requested by the defense at various stages before and during trial. On each occasion the prosecutor objected to making disclosure. His objections were sustained by the trial court, and the documents in question have never been disclosed to the defense. Appellant is thus unable to demonstrate the materiality of the evidence or the evidentiary nature of it with particularity. There is, however, a strong probability that these documents

would either contain or lead to the discovery of evidence which would be material to the issue of guilt or innocence, or would have been useful in cross-examining government witnesses, as follows:\*

#### **Division of Real Estate Files.**

Early in the stages of the Gamble Ranch development, the California Division of Real Estate issued a stop order because there was no public report permitting the sale of the property to California residents. Clejan and his attorney, Allen, were taking the position that no public report was required because of an agricultural exemption. It was about at this time that appellant Reisman entered the picture representing Byrnes and Benaron, who were purchasing interests from Clejan. Reisman immediately took the position that they should cooperate with the Division of Real Estate and obtain public reports. Thereafter applications were made for public reports, and several public reports were issued by the Division of Real Estate.

During the course of issuing the public reports the Division of Real Estate began receiving complaints from purchasers, and the Division of Real Estate made an investigation. Several of the public reports were issued after complaints had been received and after the investigation had begun.

The defendants contended that they had acted in good faith in applying for the public reports and in cooperating with the Division of Real Estate by submitting all information required in connection therewith. They

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\*This portion of the brief is intended to be only a summary statement of the facts which present the suppression of evidence problem. Later in this brief we will discuss the facts in greater detail and with transcript references.



also contended that all of the advertising had been submitted to the Division of Real Estate, and that they were led to believe that the Division of Real Estate had approved the advertising by making corrections in the copy submitted.

In anticipation of this defense, the prosecutor called employees of the Division of Real Estate who testified, in effect, that a public report is issued as a matter of course based on whatever information is submitted by the subdivider. The employees of the Division of Real Estate also said that they had no authority to approve advertising, and they minimized in general the extent to which they had participated in reviewing advertising. With respect to the investigation they were conducting while public reports were being issued, the testimony of the Division of Real Estate was that they had two departments, namely, the public report department and the investigative department, and they said that the public report department would not necessarily know what the investigative department was doing.

Appellant contends that the investigative files of the Division of Real Estate would be relevant to these issues. At the very least, the files would have been useful in cross-examining the employees of the Division of Real Estate. It is also likely that these files would contain documents which would constitute material evidence or lead to the discovery of evidence. The extent to which the advertising copy was reviewed and changed would be reflected by copies of the advertising and other memoranda contained in the files. It is also significant that the Division of Real Estate continued to issue public reports after receiving complaints

and after conducting an investigation. It is unlikely that they would have issued public reports under these circumstances without being satisfied that the complaints were unfounded.

#### **Answers to Government Questionnaires.**

Prior to trial the government mailed out questionnaires to all of the purchasers and prospective purchasers. The questions asked were calculated to determine whether these people thought the advertising was false or misleading or that the property was otherwise misrepresented. At the trial the prosecutor called the witnesses whose testimony was favorable to the government's case. The answers to questionnaires of those witnesses were disclosed pursuant to the Jencks Act. (18 U.S.C.A. 3500.) No other answers to questionnaires were disclosed except when used by the prosecutor in cross-examining defense witnesses.

The defense also called some purchaser witnesses who said that the property was not misrepresented. In cross-examination of one of the defense witnesses the prosecutor used the witness' answer to the government questionnaire. The written answer of this witness was thus disclosed, and it was consistent with the witness' testimony. Appellant contends that the prosecutor's refusal to disclose all other answers to questionnaires demonstrates a strong probability that such documents would disclose the names, addresses and testimony of witnesses favorable to the defense on this issue. This probability is demonstrated further by the incident wherein the questionnaire of the defense witness was produced in cross-examination and proved to be favorable to the defense.

B. It Is Immaterial That the Prosecutor Acted in Good Faith in Disclosing the Fact That He Had the Evidence, and That the Trial Court Sustained the Prosecutor's Objection to Producing the Documents. The Right of the Accused to Have Access to All Material Evidence No Longer Depends on Misconduct of the Prosecutor. The Only Questions Are: Whether the Prosecutor Had the Evidence; Whether He Refused to Produce It on Demand; and Whether It Would Have Been Material.

There is a suppression of evidence whenever the prosecutor fails to disclose to the accused evidence which may be helpful to him. This rule no longer depends upon misconduct of the prosecutor. The only question is whether the prosecutor knew of evidence which was material to the issues of guilt or punishment and whether he failed to disclose it to the defense on demand. This is the holding of *Brady v. Maryland* (1963), 373 U.S. 83, 87-88 [10 L. ed. 2d 215, 83 S. Ct. 1194.] :

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

"The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscrip-

tion on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md, at 427." (*Brady v. Maryland* (1963), 373 U.S. 83, 87-88, [10 L. ed. 2d 215, 83 S. Ct. 1194.]).

The basic concept that the prosecutor may not conceal evidence which may be helpful to the accused was not announced for the first time in *Brady v. Maryland*. This has been the law since at least 1935 when *Mooney v. Holohan*, 294 U.S. 103 [79 L. ed. 791, 55 S. Ct. 340], was decided. Many cases prior to *Brady* recognized and applied the rule that a suppression of evidence by the prosecutor is a denial of due process. All of the pre-*Brady* cases, however, were either expressly or impliedly decided on the theory that there must be some sort of fault on the part of the prosecutor, which could be either deliberate concealment of evidence or negligence in failing to disclose it. For example, in *United States ex rel. Almeida v. Baldi* (3rd Cir. 1952), 195 F. 2d 815, 818, the prosecutor deliberately concealed ballistics evidence by, among other things, instructing one of his witnesses not to mention the fact that a policeman's bullet was found at the



scene of the crime with blood on it. See also: *United States v. Rutkin* (3rd Cir. 1954), 212 F. 2d 641, 644-645 (prosecutor failed to disclose statements of witnesses not called at trial which would have contradicted government witnesses); *United States ex rel. Thompson v. Dye* (3rd Cir. 1955), 221 F. 2d 763, 765 (prosecutor failed to disclose fact that one of the arresting officers would contradict the other, and kept him out of courtroom when the other testified); *Alcorta v. Texas* (1957), 355 U.S. 28, 31 [2 L. ed. 2d 9, 78 S. Ct. 103] (prosecutor told witness not to volunteer certain information when testifying); *Curran v. Delaware* (3rd Cir. 1958), 259 F. 2d 707, 710 (police officer deliberately lied); *Napue v. Illinois* (1959), 360 U.S. 264, 267-268 [3 L. ed 2d 1217, 79 S. Ct. 1173] (prosecutor failed to correct testimony which he knew was false); *Powell v. Wiman* (5th Cir. 1961), 287 F. 2d 275 (prosecutor withheld prior inconsistent statement of government witness and affirmatively represented that prior statement was consistent); *United States v. Consolidated Laundries* (2nd Cir. 1961), 291 F. 2d 563, 570 (prosecutor negligently failed to turn over file which might have been helpful in cross-examining a government witness).

In all of these cases there was some sort of culpability, or at least negligence, on the part of the prosecuting officials. In fact, in one case, *Kyle v. United States* (2nd Cir. 1961), 297 F. 2d 507, 514-515, the court of appeals remanded to the district court to take evidence as to the degree of culpability on the part of the prosecutor. Other pre-*Brady* cases have held that there is no denial of due process under circumstances where the good faith of the prosecutor could not be

questioned. In *Woollomer v. Heinze* (9th Cir. 1952), 198 F. 2d 577, 579, the prosecutor was unaware of the evidence claimed to have been suppressed. This is merely newly-discovered evidence. In *Burwell v. Teets* (9th Cir. 1957), 245 F. 2d 154, 163, and in *Riser v. Teets* (9th Cir. 1958), 253 F. 2d 844, 845, the prosecutor made no secret about the fact that he had the evidence, and the trial court had ruled that he did not have to disclose it.

The distinction between the case where the prosecutor is guilty of some wrongdoing and the case where he withholds evidence in good faith makes no difference to the defendant. The prejudice to the defense in being deprived of the benefit of the information is the same in either case. Since the object of the rule is to insure a fair trial by making all evidence available to the accused, it cannot depend on the motives of the prosecutor. If he has the evidence he must disclose it. He cannot avoid this duty by in "good faith" saying that he has it but will not disclose it. This is the point decided in *Brady v. Maryland*. A failure to disclose the evidence is a denial of due process "*irrespective of the good faith or bad faith of the prosecution.*" (373 U.S. 83, 87 [10 L. ed. 2d 215, 83 S. Ct. 1194.] )

The cases since *Brady* demonstrate clearly that good or bad faith on the part of the prosecutor is no longer a consideration. In *United States ex rel. Butler v. Maroney* (3rd Cir. 1963), 319 F. 2d 622, 626-627, the prosecution had a statement of the defendant which related a prior inconsistent statement of the prosecution's chief witness, whose name was Diehl. The prosecutor showed the statement to Diehl when he testified, and marked it for identification, but refused to show it to

defense counsel. And the trial court sustained the prosecutor's objection when the defense asked to see it. Clearly there could be no question but that the prosecutor acted in good faith. But the prejudice to the defense was the same as if the statement had been concealed clandestinely, and it was held that there was a denial of due process. See also: *United States v. Wilkins* (2nd Cir. 1964), 326 F. 2d 135, 139 ("formulation of the duty in terms of willful or wrongful conduct would seem only to confuse here, and is not necessary under the governing law as we understand it."); *Ingram v. Peyton* (4th Cir. 1966), 367 F. 2d 933, 936 ("It is immaterial that this unavailability may have been occasioned by the prosecutor's error in misnaming the prosecuting witness in the indictment rather than by deliberate concealment.")

**C. Statement of Facts Showing That the Prosecutor Had the Evidence; That the Defense Requested It; and That the Prosecutor Refused to Produce It.**

**Division of Real Estate Files.**

On March 10, 1964, over a year prior to trial, the Division of Real Estate of the State of California delivered most of its files with respect to the Gamble Ranch to the federal government pursuant to a Grand Jury subpoena. After the completion of the Grand Jury proceedings, these files were placed in the custody of the Postal Inspector's office [C. T. 900; R. T. 8548-8549]. These files were examined and used by the Postal Inspector in the preparation of the government's case [R. T. 8559-8560]. Prior to trial, the United States Attorney told defense counsel that he had

these files, and pointed them out, but he said that he did not have authority to disclose them without the permission of the Division of Real Estate [R. T. 8569-8570].

On April 6, 1965, the first day of trial, the defense served a subpoena on the Division of Real Estate to produce all of their Gamble Ranch files [C. T. 907]. On the following day some files which had been retained by the Division of Real Estate were produced, but the files in the possession of the prosecution were not produced [R. T. 928-929].

On May 18, 1965, during cross-examination of a prosecution witness, George Poppe, who was an investigator of the Division of Real Estate, the defense asked again to see the files\* [R. T. 7276]. The files again were not produced, and instead a representative of the State Attorney General's office appeared later in the day and objected to production of the files on the ground that some of them were privileged [R. T. 7338-7340]. The court did not rule on the objection at that time, but asked the State Attorney General to examine the files and specify which of them he claimed were privileged [R. T. 7341].

On May 25, 1965, the Attorney General appeared again and filed a motion to quash the subpoena which had been served on April 6, 1965 [C. T. 894; R. T. 8544]. The papers in support of the motion specified the categories of documents which were contained in the files, designating them by letters as A through L.

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\*There had been a previous request for the files during cross-examination of John Block, who was the head of the Los Angeles office of the Division of Real Estate [R. T. 7164]. The matter was deferred at that time [R. T. 7170].



Of these categories, G through L, were claimed to be confidential and privileged, and were specified as follows:

“G. Letters of inquiry and complaint from purchasers of Gamble Ranch property and other persons; (with documents and advertising material connected thereto);

“H. Statements and affidavits of purchasers of Gamble Ranch property and other persons relating to said Gamble Ranch and persons connected therewith;

“I. Replies to letters of complaint and inquiry prepared by personnel within the Division of Real Estate.

“J. Internal memoranda ‘to the files’ of the Division of Real Estate and internal memoranda for distribution within the Division of Real Estate prepared by the personnel of the Division of Real Estate relating to said Gamble Ranch and persons connected therewith;

“K. Memoranda to and received from other governmental [sic] state governmental agencies concerning said Gamble Ranch and persons connected therewith; and

“L. Memoranda to and received from federal government agencies concerning said Gamble Ranch and persons connected therewith.” [C. T. 895-896].

The argument made in support of the motion to quash was directed primarily to the question of whether

the documents were privileged. The trial judge was not impressed with this argument as the files had been used by the Postal Inspector in the preparation of the government's case, and so any privilege of the Division of Real Estate had been waived [R. T. 8544-8570]. The court ruled, however, that the subpoena was too broad, and that there was no showing that the documents had "evidentiary" value [R. T. 8788-8792]. The defense thereafter served another subpoena specifying the documents with greater particularity, but the court again ruled that the defendants had not shown the evidentiary value of the documents which they had never seen [R. T. 8792-8793].

The ultimate disposition of the matter was that the judge ordered the United States Attorney to give the defense any documents which related to the direct examination of the witness Poppe. The only thing produced in this regard was a single two-page document [R. T. 8720-8271]. All others were sealed and marked for identification. A few of the files which had been shown to the judge and which were in the courtroom were marked as Court's Exhibits 2 A through 2 G. The balance of the files consisting of three boxes of documents remained in the custody of the United States Attorney's office, and were later brought to the courtroom and marked as Government's Exhibits 2-1301-A, 2-1301-B, and 2-1301-C [R. T. 8919-8921]. None of these files was ever shown to the defense. At the time the files were ordered sealed, the United States Attor-

ney made it clear that he would never disclose their contents. He said:

“Mr. Nissen: But the contents you will never know what is in it.” [R. T. 8922, lines 20-21].

#### **Answers to Government Questionnaires.**

On November 14, 1963, over a year prior to trial, the United States Attorney sent questionnaires to the purchasers and prospective purchasers of property in Gamble Ranch. The questionnaires were accompanied by a letter. The letter stated that an official investigation by the Department of Justice and the Post Office Department was in progress. The addressees were asked to answer the questions in as much detail as possible and to “treat this communication as confidential”. An example of the letter is in evidence as Defendants’ Exhibit BV, and an example of one of the questionnaires is marked for identification as Government’s Exhibit 2-1291. For convenience, these Exhibits have been reproduced in the Appendix E to this brief.

Herein it should be noted that all of the questionnaires were not withheld. A few of them were produced either as government witnesses testified pursuant to the Jencks statute (18 U.S.C.A. 3500); or during cross-examination by the prosecutor of defense witnesses. No question is raised as to the questionnaires which were produced. The problem lies in the fact that the prosecutor refused to show the hundreds of others which likely would have led to the discovery of witnesses who would have been favorable to the accused.

The existence of the questionnaires was known to the defense prior to trial, and so they were requested prior

to trial during argument on the motions for bills of particulars [R. T. 264]. The court made it clear that it would not require the prosecutor to produce the questionnaires:

“The Court: I will rule on that right now. So far as questionnaires go that they send out to witnesses, my ruling is you are not entitled to them. That is just their investigation, and it is the same thing as though they went out and interviewed the witness and had a statement of the witness. It is the same thing, in my judgment.” [R. T. 265].

Later during the same argument another counsel brought up the matter of the questionnaires again. It then appeared that the trial judge may have misunderstood the situation, and he indicated that he would reconsider it [R. T. 316-317]. But when the court finally settled the motions for bills of particulars he did not give the defense the opportunity to see the questionnaires [R. T. 479-544].

At the pretrial hearing the matter came up again with respect to inspection of government documents generally. Defense counsel pointed out that the government had six or seven cabinets marked “Closed”. The prosecutor stated emphatically that these were his cabinets and he would not even discuss their contents, but then added that they contained “questionnaires and things like that.” [R. T. 360].

This refusal to disclose the questionnaires persisted throughout the case. Toward the end of the trial the prosecutor called the Postal Inspector in rebuttal, and he tried to make it appear as if no evidence had been withheld from the defense [R. T. 14,201-14,202]. On



cross-examination the defense pointed out that a good deal of material had not been made available and specifically mentioned the questionnaires [R. T. 14,211.] The prosecutor admitted that the government never said that all of the questionnaires would be shown—only the ones with respect to witnesses who testified. He said: “There are many things we haven’t shown to them.” [R. T. 14,211-14,212].

#### **D. The Materiality of the Evidence and Its Evidentiary Nature.**

To what extent must the defendant show that the evidence which he has never seen is material and evidentiary in order to be entitled to have access to it in defending himself at trial? In many cases this is not a problem because the evidence is in fact disclosed or discovered after trial and everyone knows what it is. In *Brady v. Maryland* (1963), 373 U.S. 83 [10 L. ed. 2d 215, 83 S. Ct. 1194], it was discovered after conviction that the prosecution had an unsigned statement from the accomplice, Boblitt, wherein Boblitt admitted that he and not Brady had killed the victim. Thus, there was no mystery about what the evidence consisted of and what it would prove. It was an unsigned statement which contained a statement material to the issue of punishment in Brady’s case.

The situation is obviously different when the defendant never gets to see the evidence. Surely the prosecutor’s duty to disclose all material evidence cannot be avoided by withholding the evidence and making it impossible for the defendant to say exactly what it consists of and how it could be used. In this type of case the defendant cannot be expected to demonstrate

the nature of the evidence with particularity. The most he can show is a probability or likelihood that the thing he seeks is evidentiary and material. In *United States v. Rutkin* (3rd Cir. 1954), 212 F. 2d 641, 644-645, the defendant claimed, on appeal from a conviction of income tax evasion, that the prosecutor had suppressed a statement which it had obtained from a person named Zwillman. Zwillman was not called as a witness at the trial, but the defendant claimed that the Zwillman statement, which he had never seen, would have contradicted the testimony of one of the government's witnesses who was called. The court of appeals noted that the defendant could not allege the contents of the statement with any greater particularity because he had never had access to the statement. The case was remanded to the district court with directions to order the United States Attorney to produce the statement and to determine its materiality. In *Ellis v. United States* (D.C. Cir. 1965), 345 F. 2d 961, 962, the defendant appealed from a manslaughter conviction. He had struck the victim on the head with a board, and the victim died six days later. Proximate cause was the issue. The defendant testified that when he was arrested one of the officers told him that on the night he hit the victim the victim had gone to a hospital and had been released the same night. There was no other evidence on the subject, and the arresting officer who was supposed to have said this was called as a witness but was not asked about it. Nevertheless, the court of appeals held that there was enough of a probability of relevant evidence by way of hospital records to remand the case to determine whether the prosecutor had such evidence and whether it was material.

It is also not an inflexible rule that the thing in question must be admissible in evidence in any and all events in order to be "evidentiary". In many cases there is no physical document or thing which the prosecutor withholds. It is often only information such as the name of a witness. For example, in *United States ex rel. Meers v. Wilkins* (2nd Cir. 1964), 326 F. 2d 135, 136, the defendant claimed an alibi, but was convicted on the testimony of two eyewitnesses who identified him. There were two other eyewitnesses at the police lineup who could not make positive identification. The denial of due process was in failing to tell the defendant about the witnesses so that he could call them if he saw fit.

If the prosecutor does have a written statement, the statement must be disclosed even though it could not necessarily be used in evidence as such. In *United States v. Rutkin* (3rd Cir. 1954), 212 F. 2d 641, 644-645, the prosecutor had a statement from a person named Zwillman. Zwillman was not called as a witness. Suppose the government had given Rutkin's lawyer the Zwillman statement. What would he do with it? He could not merely put it in evidence. He would have to call Zwillman as a witness. If Zwillman testified consistently with his statement, the statement would never get into evidence. If Zwillman contradicted his statement, the prosecution might use it, but the fact remains that *prima facie* the statement was not evidence.

*Brady v. Maryland* (1963), 373 U.S. 83 [10 L. ed. 2d 215, 83 S. Ct. 1194] also illustrates that documentary evidence need not necessarily end up as admissible evidence. The facts of the *Brady* case on this point

are not set forth in the opinion of the United States Supreme Court, but are found in the opinion of the Maryland court of appeals (*Brady v. State* (1961), 226 Md. 422 [174 A. 2d 167]). The Maryland court held that Boblitt's unsigned statement might have been used in evidence as an admission against interest if Boblitt had been called but could not be compelled to testify because of his privilege against self-incrimination. But even in that event, the writing itself would not be evidence. Since the statement was unsigned, the evidence of it would be the testimony of the person who took the statement.

In *United States v. Consolidated Laundries Corp.* (2nd Cir. 1961), 291 F. 2d 563, 569-570, a file (therein referred to as the "Owen file"), had been withheld in an anti-trust case. It was not even suggested that the file might have been put in evidence. It was sufficient that the file might have been useful to the defense in cross-examination. The court said:

"It is, of course, impossible to know whether the result of the trial would have been different if defense counsel had had the Owen documents. No one can tell what might have developed had the government's principal witness been confronted with them during cross-examination, or if certain of the documents had been available to refresh his recollection about facts which he did not remember and which, if elicited, might have been helpful to the defendants."

Other cases indicate clearly that admissibility of the evidence is not the test at all. The important thing is the disclosure of information which may lead to the discovery of evidence. In *Ingram v. Peyton* (4th Cir.



1966), 367 F. 2d 933, 936, the prosecution failed to disclose to the defense the information that the chief prosecution witness had a prior perjury conviction. The information which should have been disclosed was not evidence. But with that information defense counsel might have asked the witness about it, and he could have obtained an authenticated copy of the record of conviction to put in evidence if the witness denied it. In *Giles v. Maryland* (1967), 386 U.S. 66 [17 L. ed. 737, 87 S. Ct. 793], which was a rape case, a majority could not agree on an opinion as there were differing views as to what it was that constituted the suppression of evidence. Three Justices (Brennan, Warren and Douglas) held there was suppression in failing to disclose a police report. Justice White felt that the defense should have been told that the prosecutrix had undergone a psychiatric examination, in which event the defense might have called the doctor on the question of the witness' credibility. Justice Fortas was also concerned with the credibility issue. He held that there was a denial of due process in failing to tell the defense that the prosecutrix had on another occasion claimed rape and then withdrawn the charge, and that she had attempted suicide. The only thing involved that might have constituted admissible evidence in and of itself was the police report. But its value to the defense was not limited to its evidentiary nature in the sense of being admissible in evidence. It could have been of value in leading to other evidence. The court said:

“There can be little doubt that the defense might have made effective use of the report at the trial or in obtaining further evidence.” (17 L. ed. 2d at 745).

Tested by these principles, we submit that there is a strong probability that the documents in question in this case would disclose material evidence, information which would lead to material evidence, or information which would be useful in cross-examination. The California Division of Real Estate files would be useful in cross-examining the employees of the Division of Real Estate; they would contain copies of advertising material and other documents showing the extent to which the Division of Real Estate reviewed the advertising; and they would disclose evidence or information leading to evidence bearing directly on complaints of purchasers. The answers to government questionnaires would disclose the names, addresses and testimony of purchasers who thought that the advertising was not misleading and that the property was not misrepresented.

#### **Division of Real Estate Files.**

Appellant Reisman testified extensively to the effect that he and the other defendants had relied upon the issuance of public reports by the Division of Real Estate, and that he had not only taken pains to review and correct the advertising himself or to see to it that this work was done by other attorneys, but that all advertising was submitted to the Division of Real Estate and that all corrections required by the Division of Real Estate were made. When Reisman first became involved with the Gamble Ranch in the Fall of 1959, he talked to John Block, who was the head of the Los Angeles office of the Division of Real Estate, in connection with the stop order. At that time Reisman says Block told him: "There are some obligations about the advertising." [R. T. 12,948]. Thereafter Reisman agreed with

Attorney Allen that they would divide up the work. Reisman would handle the applications for public reports, and Allen would clear up the advertising [R. T. 13,048-13,049]. Later, Reisman talked to Mr. Bircher, who was in charge of advertising at the Division of Real Estate. Reisman says Bircher told him that the advertising had been cleared to his satisfaction. Reisman says he kidded Bircher about how persnickity they had been in requiring changes, and that Bircher more or less agreed with him and said: "Well, we just put in everything we could think of." [R. T. 13,049-13,050]. Reisman said that he discussed the advertising with Bircher several times. He said that on one occasion Bircher told him that he was satisfied with the advertising and that it was accurate and correct [R. T. 13,071]. On still another occasion Reisman says Bircher told him he was satisfied with the advertising [R. T. 13,392].

Later Bircher died and the duties of reviewing advertising in the Division of Real Estate were taken over by Lee V. Sida [R. T. 1389]. On one occasion Reisman made an appointment for John Roche to see Sida [R. T. 13,066]. Roche was an advertising consultant employed by the Gamble Ranch organization [R. T. 1145-1148]. Reisman said that Roche was told to submit all advertising to the Division of Real Estate, and that the Division of Real Estate was constantly reviewing advertising [R. T. 13,372-13,375]. Reisman said that he advised his clients, Byrnes and Benaron, that in addition to his own screening of the advertising, it was being reviewed and revised by the Division of Real Estate, and that they could rely on such approval [R. T. 13,377].

Roche was called by the prosecution, but he corroborated the position of the defendants that the advertising had been reviewed and revised extensively by the Division of Real Estate. Roche had had approximately 51 years experience in handling advertising [R. T. 1145]. While he did not necessarily specialize in land development advertising, he had been engaged in this type of advertising since 1915, it was a large percentage of his business, and his agency was one of the largest in the United States dealing with the production of land brochures [R. T. 1361-1365]. He said that it was the practice of the Division of Real Estate to approve and disapprove advertising, especially in land development cases [R. T. 1170]. He said that he had been instructed to submit all advertising to the Division of Real Estate [R. T. 1168]. Roche said he reported to Clejan that Bircher had been cooperative, but harsh, in requiring changes, and that he had made the changes requested [R. T. 1173-1174, 1242-1244]. Roche said he never tried to talk the Division of Real Estate out of making changes, but always revised the advertising in accordance with their wishes [R. T. 1382]. Roche said that Reisman told him to see Sida about the Victor Gruen report [R. T. 1306]. He said that Sida did not expressly approve or disapprove the advertising based on the Gruen report, but that he suggested changes which were made [R. T. 1389-1396]. Roche said that Reisman submitted the first four-color brochure to Sida. Roche said he had it picked up at Sida's office, and that there were corrections on it which were adopted [R. T. 1399-1403].

With respect to public reports, Reisman said that when he became aware of the stop order he immediately



took the position that the company should cooperate with the Division of Real Estate and apply for public reports [R. T. 12,954]. He personally handled the applications for public reports and saw to it that all information requested was submitted to the Division of Real Estate [R. T. 12,993-13,047]. Reisman said he was not aware of the fact that the Division of Real Estate was conducting a fraud investigation [R. T. 13,302-13,303]. Block, the head of the Los Angeles office, admitted he did not tell Reisman that the investigation was being conducted, and he admitted that three public reports were issued while this investigation was pending during the years 1961 and 1962 [R. T. 7130-7132]. Reisman was asked whether he had any belief as to whether the Division of Real Estate would issue public reports while they were investigating for fraud. He said it would not make any sense to do that [R. T. 13,307]. He said that Mr. Scholfield, another employee of the Division of Real Estate, had told him that they would not issue a public report until after they had determined that the property could be used for the purpose for which it was being sold [R. T. 13,358-13,359]. On still another occasion Reisman was contemplating filing a registration statement with the Securities and Exchange Commission, and he specifically inquired whether the company was in good standing with the Division of Real Estate. Reisman said Scholfield told him they were in good standing [R. T. 13,195]. He said Block told him the same, and that there were no complaints against the company [R. T. 13,197].

The testimony of John Block was in sharp contrast. His position with respect to advertising was that the Division of Real Estate had no authority to approve or

disapprove, that the extent to which they even saw advertising was much less than contended by the defendants, and that they made no changes in any advertising copy. He said that Roche showed him a brochure at one time and asked for his opinion. But he said that he told Roche that he had no basis to examine it, that he would look at it only to see if anything was blatantly false, and that he never told Roche that any advertising was cleared or that it met with approval [R. T. 7061-7062]. Block said that he told Roche that he had no authority to approve advertising, and that no changes were made in the brochure that was submitted [R. T. 7112-7114]. He said that the only other advertising reviewed by the Division of Real Estate was advertising which they might read in the newspapers, and the advertising was not reviewed at the request of the company [R. T. 7063-7064]. Block said they did not pass on the original advertising in 1959, and only made comments on ads that they saw in the newspapers [R. T. 7073-7074]. He said that Roche had approached Sida with a brochure, but that Sida had told him the same thing, that he had no authority to approve advertising. Block said that Sida made no changes in the brochure, and only turned it over to their investigative section [R. T. 7115].

Block testified in effect that there was no correlation between the fraud investigation they were conducting and the issuance of public reports. Block said that there were two sections in the Division of Real Estate, the investigative section and the subdivision reporting section [R. T. 7039]. He said the subdivision reporting section accepted at face value the questionnaires and supporting letters submitted by the subdivider [R. T.

7042]. A deputy would inspect the property and make a report, and the public report would then issue [R. T. 7043-7045]. There was no liaison with the investigative section unless the investigative section had filed a formal action [R. T. 7046]. He said no public report would ever be withheld on the basis that an investigation was pending [R. T. 7047]. He said the requirements for a public report were very minimal [R. T. 7072]. The public report would be issued as long as the requirements of the questionnaire were met [R. T. 7097]. Block admitted that he was the head of the office and so knew what both sections were doing, but he said he would not advise the report section that an investigation was pending unless there was a formal action [R. T. 7116]. Block admitted that Reisman made inquiry as to the standing of the company with the Division of Real Estate when he was getting ready to file a registration statement with the Securities and Exchange Commission, but when asked whether he told Reisman there was nothing wrong with the Gamble Ranch, he said that he "never advised him in that context." [R. T. 7128-7132]. Later, when asked about this again, Block specifically denied telling Reisman there were no complaints against the company [R. T. 7181-7182].

George Poppe was the Division of Real Estate employee who conducted the investigation. He said he checked with Sida about his review of advertising, but could not recall whether he made any written report about this [R. T. 7235-7236]. Later, he said that in talking to Sida, he learned that Sida had submitted some advertising to his superior, Harrington, who had made pencilled notes on the advertising material. Poppe

said, however, that all he wanted to know was whether Sida had approved or disapproved, and he was satisfied with his statement that he had not [R. T. 7290-7294].

Sida said that he could recall only one piece of advertising with respect to Gamble Ranch, and that was a newspaper ad referring to the Victor Gruen plan [R. T. 14,149-14,152]. He said he discussed this with Roche, and that was the first and last time he had even heard of Roche [R. T. 14,153-14,154]. He said he did not approve any brochure and had no authority to do so [R. T. 14,154]. He said he could not recall ever having talked to Poppe about advertising [R. T. 14,-168].

We submit that there could not be a clearer case of conflicting testimony. Reisman contended that he acted in good faith because he cooperated with the Division of Real Estate, furnished all information required, and obtained public reports. The Division of Real Estate, on the other hand, said there is no justification for such reliance. They accept whatever information that is submitted to them, and they issue the reports as a matter of course. Reisman said it would not make sense to do that when a fraud investigation was pending. The Division of Real Estate said that has no significance. These are separate sections of the Division of Real Estate, and neither knows what the other is doing.

The company advertising was the very heart of the case. In this area the testimony was hopelessly conflicting. Reisman said all of the advertising was submitted for approval. The Division of Real Estate denied this. They would admit only to seeing a few scat-



tered items and reading of newspaper ads. Reisman said they did express approval on some occasions and at least implied approval on others by making changes in the advertising copy. This was flatly denied, and Sida even denied talking to Poppe about advertising when Poppe said that he had talked to Sida and may have even made a written report about it.

These conflicts in the testimony were all on material matters. But even if the conflicts had been with respect to immaterial matters, they clearly raised a credibility question which was important. In *Curran v. Delaware* (3rd Cir. 1958), 259 F. 2d 707, 712, the evidence suppressed was one of the statements made by the defendants to the police. The defendants claimed they had made two statements, and the police claimed they had made only one. The differences in the statements were not particularly important. The important thing was that this conflict created a credibility gap between the defendants and the police. The jury is more likely to believe the police, and if they disbelieved the defendants on this point as to how many statements there were, they would be likely to disbelieve them on other material points.

The defendants in this case were placed in the same position. Is there any question of who the jury is likely to believe as between a lawyer for the company and supposedly disinterested officials of the State Division of Real Estate? The credibility of the Division of Real Estate officials was extremely important. Surely there is something in their files which would have been useful to the defense in cross-examining them.

But the conflicts in the testimony were not on immaterial points. It was an important issue whether all

of the advertising had been submitted to the Division of Real Estate. Whether or not the Division of Real Estate actually made changes in the copy would be strong evidence of their approval. It is hard to believe that they were conducting a fraud investigation and at the same time issuing public reports unless their investigation showed that there was no fraud. This admitted fact alone, notwithstanding Block's statement that one section would not know what the other was doing, is enough to make anyone curious as to what is in those files.

#### **Answers to Questionnaires.**

There is also a strong probability that some, if not all, of the hundreds of undisclosed answers to government questionnaires will contain statements of witnesses which will contradict the government purchaser witnesses. To a man, each of the government purchaser witnesses testified in substance, if not in so many words, that the property was misrepresented, and they also so stated in their questionnaires. There can be no doubt that this was an important issue and that this was damaging evidence. With nothing more, is it not at least peculiar that the prosecutor was so determined to withhold all of the other questionnaires? What possible reason could he have? There is only one reasonable inference that can be drawn. The other questionnaires are probably not favorable to the government, and conversely they are likely to contain statements favorable to the accused.

The probability of favorable evidence in the undisclosed questionnaires is not a mere possibility. As noted earlier, some questionnaires were disclosed in two

ways: (1) pursuant to the Jencks statute (18 U.S.C.A. 3500) as the government witnesses testified; and (2) in cross-examination of defense witnesses. The one which is reproduced in the appendix, and marked for identification as Government's Exhibit 2-1291, is in the latter category. (See Appendix E.)

This statement was made by Walter Garrick. Mr. Garrick's wife was called by the defense. She was an excellent witness for the defense. She stated flatly that the property was not misrepresented. She said: "If anything it was better than I had expected it to be." [R. T. 9941]. On cross-examination the prosecutor produced the Garrick questionnaire. He first established that, although it was signed only by Mr. Garrick, Mr. and Mrs. Garrick had filled it out together. He then pointed out that there were various statements in the questionnaire such as that a salesman had said that there was water at 10 to 35 feet or more [R. T. 9980-9984]. There are many other statements in the Garrick questionnaire which the prosecutor apparently considered unimportant, as he did not ask Mrs. Garrick about them. They are as follows:

Page 7, paragraph IV D:

"D. Was the appearance of any of the above items (that you saw) what you thought it would be?

*Yes* If yes, which items?

*All of it was what we had expected it to be."*

Page 8, paragraph V E:

"E. Have you made any complaint, or request for a refund or cancellation? *No.*"

Page 9, paragraph VI A:

“VI. Have you made any effort to ascertain whether or not the land you purchased was fairly represented by the salesman and sales material? *Yes—we went there.* If so, what effort?

“A. Do you feel that the land was: (Check approximate box)

1. Accurately represented ☒
2. Misrepresented ☐
3. Other (specify) .....

Page 10, paragraph VII:

“VII. Please furnish any comments concerning your dealing with or knowledge of Gamble Ranch which you feel would be helpful to this inquiry.

“So far as we are concerned, we know about what to expect—we knew the property was undeveloped, but felt—and still feel—that the potential is there. It is in a very beautiful setting of mountains, and when we were there in August the temperature was very pleasant. Although we did not buy the property with the intention of living in Montello, we thought it a good investment.”

The cross-examination of Mrs. Garrick was certainly ineffectual, and probably it was unfair. But we are not here arguing the effectiveness or fairness of the attempt to impeach Mrs. Garrick. The point is this: The prosecutor had this questionnaire long prior to trial. He knew that Mrs. Garrick was a witness favorable to the accused and that she would materially contradict



his other witnesses. Yet he did not call Mrs. Garrick; he did not tell the defense about Mrs. Garrick; he did not even tell the defense he had a statement from Mrs. Garrick. Fortunately the defense found Mrs. Garrick on their own, and so do not complain that they were deprived of the benefit of her testimony. But how many other witnesses are there like Mrs. Garrick who have given similar statements known only to the prosecutor? The conclusion is inescapable. The prosecutor has suppressed a considerable amount of evidence in failing to disclose the questionnaires, and there is a strong probability that some, if not all, of this evidence would be favorable to the accused.

**E. None of the Objections Made to Producing the Evidence Was Valid.**

Three arguments were made in opposition to disclosure of the Division of Real Estate files: The State Attorney General argued: (1) That the documents were privileged; and (2) that the defense had not shown that the documents were evidentiary [C. T. 896, 897]. The prosecutor argued: (3) That he was not required to disclose the files as his duty was only to furnish statements of his witnesses pursuant to the Jencks Act [R. T. 8553-8556]. The argument made with respect to the answers to government questionnaires was apparently also based on the Jencks Act. Whenever the matter came up, either the court or the prosecutor stated, in effect, that disclosure of witness statements would be required only in cases where the witness testified for the government [R. T. 264-267, 316-317, 360-361, 14,211-14,212].

### Privilege.

The trial court indicated that it was not sustaining the privilege argument [R. T. 8544-8570, 8788-8792]. The claim of privilege was based on California *Code of Civil Procedure* §1881, subd. 5, which is California's codification of the informer's privilege. It provides that "A public officer cannot be examined as to a communication made to him in official confidence, when the public interest would suffer by the disclosure." Since the statute speaks only of statements made *to* the officer, it clearly would not cover all of the material in the Division of Real Estate files (*Crosby v. Pacific S.S. Lines* (9th Cir. 1943), 133 F. 2d 470, 475). There was also no proof whatever that the files were in fact confidential or that the public interest would suffer by disclosure (*City and County of San Francisco v. Superior Court* (1951), 38 Cal. 2d 156, 163 [238 P. 2d 58]). The most obvious deficiency in the privilege argument was that there was a waiver in giving the files to the federal government without objection in response to the Grand Jury subpoena (*Markwell v. Sykes* (1959), 173 Cal. App. 2d 642, 648-649 [343 P. 2d 769]). In fact, there was more than a waiver of privilege. The state had actually surrendered the files to the federal prosecutor. After the Grand Jury proceedings the files did not remain with the Grand Jury, and they were not returned to the state. They were delivered to the Postal Inspector for preparation of the government's case, and the Postal Inspector in fact so used them [R. T. 8548-8560]. Even when a subpoena was served at the com-

mencement of the trial, the state made no objection. They produced such files as they still had without objection, and made no mention of the others because they did not have them.

The truth of the matter is that these files were not in the possession, custody or control of the Division of Real Estate at all. At all times material they were in the hands of the prosecutor. He did not even bring them down to the courtroom until he was sure that they would be sealed and that the defendants would never see them. The only reason for the subpoena directed to the state was to overcome the prosecutor's initial claim that he had no control of the files. After the State came in and argued its privilege objection, and when it became apparent that this did not impress the trial judge, the prosecutor had to abandon his position of neutrality. He said that he was not required to disclose anything except statements of his witnesses pursuant to the Jencks Act. He claimed there was nothing evidentiary in the files and so the defense had no right to anything but Jencks Act statements [R. T. 8553-8554]. And this was the way the court ruled. The only thing disclosed was one two-page memorandum which was claimed to be the only thing relating to Poppe's direct examination. As to all the rest, three boxes full, the court accepted the prosecutor's statement that there was nothing evidentiary in those files.

### Jencks Act.

The Jencks Act is not applicable by its terms to the Division of Real Estate files. The Jencks Act deals only with statements or reports made by government witnesses or prospective government witnesses to agents of the government (18 U.S.C.A. 3500, subd. (a)). Herein we need not concern ourselves with whether the Division of Real Estate files may contain statements of government witnesses or prospective government witnesses. Being state files, it is a certainty there are no statements made to agents of the federal government.

The Jencks Act is also not applicable to the undisclosed answers to government questionnaires. It applies only to statements of government witnesses or prospective government witnesses. The statements which the defendants seek are those made by people who will say that the advertising was not false and that the property was not misrepresented. These are not prospective government witnesses. They are prospective defense witnesses.

But even if the Jencks Act were held applicable, it cannot be constitutionally applied to a suppression of evidence case. *Brady v. Maryland* and all other suppression of evidence cases are based on the due process clause of the Constitution. Congress could not by the Jencks Act or any other statute authorize the prosecutor to suppress evidence helpful to the accused. If this were permissible, then the Jencks Act would be a very



effective weapon of the prosecutor. In the case of a prospective witness whose testimony favored only the accused, he would not call the witness at all. He could withhold the statement because the Jencks Act requires disclosure only after the witness has been called by the United States and has testified on direct examination (18 U.S.C.A. 3500, subd. (b)). In the case of a witness whose statement contains things helpful to both sides, the prosecutor would limit (or attempt to limit) his direct examination to the matters helpful to the government's case. In that event he must produce the statement, but if he has been able to limit the direct examination, he can have the court excise the parts that are favorable to the accused (18 U.S.C.A. 3500, subd. (c)). In fact, it appears that this is exactly what the prosecutor did in the case of the witness George Poppe. On direct examination the prosecutor attempted to limit Poppe's testimony to certain specific subject matters, one of which was a meeting with some of the defendants and their counsel in June of 1962 [R. T. 7198-7229]. On cross-examination the witness was asked for his notes. These notes were not a statement made to the government, but were notes which the witness had in his hands. The witness handed them to defense counsel, but before they could be examined, the prosecutor had the court excise everything except that which pertained to the direct examination about the meeting [R. T. 7229-7233]. When it came to taking a look at the Division of Real Estate

files, the prosecutor also obtained excision of everything except a two-page memorandum which he claimed was the only thing relating to Poppe's direct examination [R. T. 8720-8721].

We submit that the Jencks Act argument cannot withstand analysis. The courts have held consistently and repeatedly that suppression of evidence by the prosecution is a denial of due process. Neither the Jencks Act nor any other statute can change that. The only questions are whether the prosecution has evidentiary material favorable to the accused, and whether he failed to disclose it on request to do so. Here there is no question but that the United States Attorney had the Division of Real Estate files and answers to questionnaires, and that he refused to disclose them to the defense when requested to do so. The only question there can be is whether the files and answers in fact contain evidence favorable to the accused. Since the documents have never been disclosed, the defendants are only required to show the probability of the existence of the evidence. It is further not a requirement that the documents be admissible in evidence as such. It is sufficient if they contain information which would be useful in cross-examining government witnesses or if they contain information which would lead to the discovery of admissible evidence.

Because of the suppression by the prosecution of this valuable evidence, the judgment of conviction should be reversed.

III.

PRONOUNCED AND PERSISTENT ACTS OF MISCONDUCT BY THE PROSECUTOR DEPRIVED APPELLANT OF A FAIR TRIAL AND REQUIRE REVERSAL.

The transcript is studded with numerous acts of the prosecutor's misconduct, the effect of which was necessarily to deprive appellant of his right to a fair trial.

Appellant does not make this contention lightly. A review of the authorities shows that the different kinds of prejudicial misconduct committed by prosecutors in the past is as unlimited as the imagination of man. Almost every one of the multitudinous varieties of misconduct condemned in the cases occurred here:

Improper and prejudicial statements in putting questions to witnesses; *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319-1321; Wigmore, *Evidence*, §1808 (McNaughton Rev. 1961) and cases cited therein; *People v. Parmelee*, 138 Cal. 123 (1934); *People v. Tucker*, 164 App. 2d 624, 628 (1958).

Adducing inadmissible material for the jury's consideration by the use of insinuating questions; *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319 (1935); *People v. Fox*, 126 Cal. App. 2d 560, 570 (1954).

Suggesting by questions the existence of facts in respect of which no proof was offered; *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319 (1935); *People v. Hamilton*, 60 Cal. 2d 105, 116 (1963).

Going very far afield in cross-examination beyond the direct examination to discredit a witness by questions asked in bad faith as shown by failure to prove the affirmative after having received a negative reply in answer to the question; *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319 (1935); *People v. Hamilton*, 60 Cal. 2d 105, 116 (1963), *United States v. Perlstein*, 120 F. 2d 276, 283-283 (3d Cir. 1941); *United States v. Haskell*, 327 F. 2d 281 (2d Cir. 1964).

Improper and incorrect statement of facts in the argument of the case; Wigmore, *Evidence*, §1806 (McNaughton Rev. 1961); *People v. Love*, 56 Cal. 2d 720 (1961); *Viereck v. United States*, 318 U.S. 236, 247, 87 L. ed. 734, 741 (1943); *Dugan Drug Stores, Inc. v. United States*, 326 F. 2d 835 (8th Cir. 1964).

Impeachment of witnesses by methods obviously known to prosecutor to be improper; *People v. Hamilton*, 60 Cal. 2d 105, 116 (1963).

Direct attacks on the integrity of defense counsel; *Berger v. United States*, 295 U.S. 78, 88, 79 L. ed. 1314, 1321, 55 S. Ct. 629 (1935); *New York Central R. Co. v. Johnson*, 279 U.S. 310, 316-318, 73 L. ed. 706, 710, 49 S. Ct. 300 (1929).

Appeals to passion and prejudice of the jury; *Viereck v. United States*, 318 U.S. 236, 247, 87 L. ed. 734, 741 (1942); *New York Central R. Co. v. Johnson*, 279 U.S. 310, 316-318, 73 L. ed. 706, 710, 49 S. Ct. 300 (1929).



**A. The Admission in Evidence of a Consent Agreement Between the Gamble Ranch Company and the California Real Estate Commissioner Was Plain and Prejudicial Error and the Prosecutor's Use of the Consent Agreement Was Prejudicial Misconduct.**

In June and July of 1962 discussions between the Real Estate Commissioner's office and the Gamble Ranch Corporation concerning alleged misrepresentations by the Company brought about negotiations regarding a voluntary agreement by the Company to stop sales of land in California pending further investigation by the Real Estate Commissioner [R. T. 11,192-11,194; R. T. 12,605-12,609; R. T. 14,017-14,024]. The officers and attorneys for Gamble Ranch volunteered to stop all sales until solution of the problems raised by the Real Estate Commissioner [R. T. 12,609].

Three lawyers, Eugene Wyman, Marvin Finell and Bertram H. Ross testified that the corporation itself offered to cease sales pending further investigation by the Real Estate Commissioner until the problems raised by the investigation were resolved. The Real Estate Commissioner wanted a ". . . formal document legalizing a cease and desist requirement, and an informal agreement would be satisfactory to the department." [R. T. 12,609, lines 16-18]. Finell testified that Wyman, Finell and Ross told the Real Estate Commissioner,

" . . . we would consent to a formal decree if two things were clear: if Number One it was clear that there was no allegation or admission of fraud on the part of the corporation or any of the officers of the corporation, or for that matter, any salesmen . . ." [R. T. 12,609, lines 20-25].

Finell further testified that one of the representatives of the Real Estate Commissioner agreed to that condition [R. T. 12,610, lines 16-17] and it was further agreed that the Real Estate Commissioner would prepare and forward to the corporation a Consent Decree for execution by the officers of the Corporation [R. T. 12,610, lines 23-25]. The agreement was made for the Real Estate Commissioner by the man from the Commissioner's San Francisco office, who had acted as chairman of the meeting for the Real Estate Commissioner [R. T. 12,610, lines 13-24]. Finell and Wyman received a copy of the Consent Agreement [Ex. 1-1125] and together they examined it and concluded there was no admission of fraud in it.\* Accordingly Finell advised their clients there was no admission of fraud and they could sign the Consent Agreement; the clients did so on Finell's advice [R. T. 12,611-12,613]. The testimony of Ross and Wyman was to the same effect [R. T. 11,192-11,194; R. T. 14,017-14,027].

On July 16, 1962 corporation officers signed the document entitled "Order to Desist and Refrain; Stop Order; and Consent Agreement." [Ex. 1-1125; R. T. 6,276-6,277]. This document, hereinafter referred to as the "Consent Agreement" provides, in pertinent part [paragraph VI] that the Company and named individuals ". . . represent and agree that each and all of the legally required facts and circumstances for the issuance of [a Cease and Desist] Order by the Commissioner [pursuant to Business and Professions Code section 11,019] exists. . . ." The Consent Agreement was not an admission of fraud or wrongdoing and the

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\*See Appendix D for reproduction of Ex. 1-1125.

record shows the representatives of the California Real Estate Commissioner knew this, as shown below.

The grounds for issuance of a Cease and Desist Order are a finding by the Commissioner that the subdivider is violating certain provisions of the subdivision law or that “. . . further sale . . . of . . . parcels . . . would constitute grounds for denial of the issuance of a public report under the provisions of section 11,108 [of the Business and Professions Code] . . .” (See Business and Professions Code §11019).

Section 11,018 has eight sub-sections, (a) through (h) each constituting separate grounds for refusing issuance of a public report. Only sub-section (b) provides for refusal to issue a public report when:

“(b) The sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees.”

It was not clear from the Consent Agreement which sub-section of Business and Professions Code section 11018 was relied upon as the jurisdictional basis of the Consent Agreement. Undoubtedly the Consent Agreement was so vaguely worded in order to conform to the agreement between the Commissioner and attorneys for defendants that execution of the Consent Agreement would not be an admission of fraud.

**(1) Receiving the Consent Agreement in Evidence as an Admission of Fraud by Defendants Constituted Plain and Prejudicial Error.**

Statements made during settlement negotiations and the settlements themselves are not admissible to show liability of the party offering to satisfy a claim unless the offer or statement is an unconditional admission of

liability (IV *Wigmore, Evidence*, section 1062 at pages 34 and 39 (McNaughton Rev. 1961)).

Here, the California Real Estate Commissioner had a “claim” against defendants which was settled by the Consent Agreement [Ex. 1-1125]. Now the prosecution in the present case has used *not statements made in negotiation, but the Consent Agreement itself* as evidence that defendants admitted liability for alleged misrepresentation. Such use of the Consent Agreement was improper, and prejudicial error.

In civil cases the authorities hold that settlement with one claimant is not competent evidence of an admission of liability in a lawsuit brought by another claimant. In *Price v. Atcheson, Topeka & Santa Fe Railroad*, 164 Cal. App. 2d 400 (1958), defendant had been subjected to separate lawsuits by A and B, who had both been injured in a derailment of defendant’s train. Plaintiff B sought to place in evidence defendant’s stipulation for judgment in favor of A in a different case. It was held that this settlement with A was not admissible against defendant in B’s trial.

The Court reasoned that admitting evidence of a compromise settlement was harmful because it invaded the province of the jury on the ultimate question of liability, poisoned the minds of the jurors, amounted to using the defendant’s own opinion on a matter in which he was not a competent expert, and was inimical to the policy favoring settlements. The Court stated, *inter alia*:

“ . . . [It] should be the aim of the court to endeavor to derive a determination of factual liability by competent proof of the circumstances and occurrences constituting the transaction alleged,



and it should not be guided by compromise settlements which the defendant has made of other claims arising out of the same facts. . . .

\* \* \* \* \*

“‘It is contrary to public policy to subject a person who has compromised a claim to the hazard of having his settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction. To receive such evidence would inevitably tend to discourage settlements out of court if one’s purchase of his peace with one person were to be thereafter taken as an admission of his liability for an occurrence which brought injury to another. Reasonable and compelling circumstances might very well influence the defendant to make settlement with the third person while denying all liability to the plaintiff. No party to a justiciable controversy should be discouraged from amicably adjusting his claim by the fear that he might subsequently be confronted with the contention that his concession there was an admission of liability. The rule protecting compromises is too salutary to be whittled away.’” (164 Cal. App. 2d at 404-407. *Accord: Brown v. Pacific Electric Railway Co.*, 79 Cal. App. 2d 13 (1947)).

Only a few decisions touch upon the problem of using *civil* settlements as evidence of *criminal* liability. In *Helms v. State*, 35 Ala. App. 187, 45 So. 2d 170 (1950) defendant, charged with assault with intent to murder, was cross-examined as to whether or not he had paid the victim \$1,500 in settlement of a civil action by

the victim against the appellant. It was held by the Appellate Court that such settlement of the civil case did not constitute admissible evidence of guilt in the criminal case. The Court reasoned:

“We have found no cases from this jurisdiction, or from any other for that matter, which consider the question of admissibility of evidence in the criminal prosecution of the settlement of a civil action growing out of the same incident.

“However, it is clearly settled by the doctrine of our cases that a judgment gained in a civil suit is not admissible against the defendant in a criminal prosecution growing out of the same transaction. *Britton v. State*, 77 Ala. 202. Conversely, verdicts in criminal cases are not admissible in civil cases arising out of the same transactions. *Carlisle v. Killebrew*, 89 Ala. 329, 6 So. 756, 6 L.R.A. 617.

“In 22 C.J.S., Criminal Law, section 50, the general rule, amply supported by authority, is stated as follows: ‘. . . it is generally held that a judgment or opinion in a civil action or the record of proceedings therein, is not admissible in a subsequent criminal prosecution involving the same matter.’ The reasons underlying the doctrine are that the parties are not the same; the penalties are not the same; the causes of action are different; the burden of proof is not the same; the rules of procedure are not the same, in that in a civil action the defendant may be forced to testify, where he cannot be compelled to do so in a criminal proceeding.”

The Court then reasoned that evidence of civil settlements was as inadmissible in a criminal case as evidence of civil judgments.

“It would rationally appear that if a *judgment* obtained in a civil proceeding is inadmissible, in a subsequent criminal prosecution, where at least a civil judgment was obtained after hearing under judicial supervision, then certainly a *settlement* in a civil cause, made without the protection of trial safeguards, and perhaps merely to get rid of the worry of a pending suit, cannot be said to have any probative value in determining the issues of the criminal prosecution. It further cannot be denied that evidence of the settlement of the civil suit, growing out of the same matters as does the criminal prosecution, would ordinarily tend to influence the mind of a juror in the criminal prosecution to the prejudice of the defendant. [Emphasis added]. Reversed and remanded.”

*Accord:*

*Strickland v. State*, 115 So. 2d 273, 276, 5 Div. 560 (Ala. 1959).

Only two Federal cases have been found which touch upon the point in question. *United States v. Konovsky*, 202 F. 2d 721, 726-727 (7th Cir. 1953) was a criminal prosecution for conspiracy to deprive persons of their civil rights. Shortly after the alleged offense occurred the Federal District Court issued an order for a temporary injunction to prevent defendants from repeating or continuing the same acts charged later in the criminal indictment. In the criminal case the Government introduced in evidence the civil injunction order and argued that defendants' compliance with the

injunction was an “admission” of facts showing guilt of the criminal charge. The jury was instructed that the civil injunction was not evidence of guilt and the Government argued that the civil judgment was merely “. . . a circumstance in the light of which the conduct of the defendants should be ‘evaluated’.” A judgment of conviction was reversed. The Court of Appeal held that admitting the civil judgment in evidence was plain and prejudicial error, stating:

“We see no escape from the conclusion that the inevitable effect of the introduction of the civil judgment in evidence was to lead the jury in the trial of this criminal case to believe that the same issues had already been determined in the civil action. In our opinion nothing could be more prejudicial to a fair trial. See *Hodges v. State*, Okl. Ct.App., 222 P.2d 386. . . .

“It is said that the defendants waived the objection in this respect. We do not understand that the mere fact that defendants attempted to meet the erroneous evidence constituted waiver upon their part. . . . Furthermore, even if defendants had waived the objection, we think it would be our duty under Rule 52(b) of the Rules of Criminal Procedure, 18 U.S.C., to notice the error ourselves.”

Federal courts should recognize that the policy expressed in *Konovsky* requires a holding in a case like the present one “. . . that if a *judgment* obtained in a civil proceeding is inadmissible in a subsequent criminal prosecution, where at least a civil judgment was obtained after a hearing under judicial supervision, then certainly a *settlement* in a civil cause, made without protection of trial safeguards, and merely to get



rid of the worry of [the civil matter], cannot be said to have any probative value in determining the issues of the criminal prosecution.” (*Helms v. State, supra.*)

The extreme prejudice from improperly admitting such evidence in a criminal case may actually deprive a defendant of due process by denying him a fair trial. It is an unresolved constitutional issue which may yet go to the United States Supreme Court, as shown by the recent case of *Hamilton v. California*, ..... U.S. ...., 19 L. Ed. 2d ....., 88 S. Ct. 243 (1967) where three Justices of the United States Supreme Court indicated there may be grave constitutional problems involved in the use of offers of compromise as admissions of criminal liability. The *Hamilton* case was a memorandum decision denying a petition for Writ of Certiorari. Petitioner sought review of the decision of the California Supreme Court in *People v. Hamilton*, 60 Cal. 2d 105 (1963). In *People v. Hamilton* the defendant, while under arrest for suspicion of murder, volunteered an offer to plead guilty if he were guaranteed he would not receive the death penalty. This offer of compromise was received in evidence as an admission of guilt. The California Supreme Court held it was error to use the offer of compromise as an admission of guilt; however, finding independent and over-whelming evidence of guilt the California Supreme Court invoked the “harmless error” rule of the California Constitution and affirmed the conviction (60 Cal. 2d at 112-114). In dissenting from the denial of Hamilton’s petition for certiorari, Justices Douglas, Fortas and Marshall, noting the rule applicable in civil cases, voted to grant certiorari to decide whether use of the compromise offer violated due process.

One of the reasons for not using a civil judgment or settlement as evidence on the ultimate question is that the issues are *not* the same. *Helms v. State, supra*. That is clearly true here. In the Real Estate Commissioner's administrative proceedings under the California Real Estate Subdivision Law it is not necessary to prove "specific and actual intent to defraud" as would be the case in a criminal proceeding for mail fraud. See *Phillips v. United States*, 356 F. 2d 297, 303 (9th Cir. 1965). The California Real Estate Commissioner has authority to issue a stop order to protect the public against the risk of purchasing poorly developed lots or parcels, whether or not the developer has made misrepresentations. See *Chapman v. Division of Real Estate*, 153 Cal. App. 2d 421, 430 (1957) where it was held the Real Estate Commissioner had power to stop sales of lots on grounds that the subdivision was characterized by poor and irresponsible planning. No necessity of showing any kind of fraud, civil or criminal, appears from the opinion. Therefore, it is irrelevant whether or not the evidence here justifies the conclusion that defendants agreed the Real Estate Commissioner had jurisdiction to issue a Stop Order. Even if they had so agreed that would not prove that defendants admitted they had committed criminal fraud since the Commissioner may issue a Stop Order on a showing of far less serious wrongdoing than necessary to convict for criminal fraud, or without showing wrongdoing at all.

The admission in evidence of the Consent Agreement was plain and prejudicial error.

**(2) The Prosecutor's Offer and Use of the Consent Agreement as an Admission of Fraud Constituted Prejudicial Misconduct.**

The Consent Agreement in the present case, Exhibit 1-1125, does not specify any grounds for a Stop Order other than the existence of facts required for an order under section 11,019, California Business and Professions Code. Defense witnesses testified, and they were not contradicted, that the agreement with the California Real Estate Commissioner provided that the Consent Agreement was not, and would not be treated as, an admission of fraud.

During the trial the prosecution called three witnesses from the office of the California Real Estate Commissioner, namely Henry Block, George Poppe and Lee V. Sida [See R. T. 7038, 7198, 14,147]. None of these three witnesses contradicted the defense testimony regarding the terms, conditions and circumstances of and surrounding the defendants' execution of the Consent Agreement. And no other witnesses were called by the prosecutor to contradict the defense testimony.

Nevertheless, the prosecuting attorney, in cross-examination and argument, attempted to establish that the execution of the Consent Agreement was an admission by the defendants that they had been guilty of fraud, misrepresentation and deceit in selling the ranch land. In the prosecutor's cross-examination of John Carey, the officer who signed for the corporation, the prosecutor implied and the witness denied that Carey knew or believed the Consent Agreement charged the corporation with fraudulent practices:

"Q. Were you aware, sir, when you signed that order . . . [and Consent Agreement] . . . that the

facts, conditions, and circumstances legally required for such an order involved fraud, misrepresentation and deceit?

A. No, I did not.” [R. T. 6454].

During cross-examination of Finell and Ross, attorneys for the Gamble Ranch Corporation, the prosecutor insinuated, and the witnesses denied, that fraudulent practices are the jurisdictional basis for the Commissioner’s making a Stop Order and that signing the Consent Agreement was an admission of fraud [See [R. T. 12,632-12,635; 11,474-11,480; 11,493]. Finell specifically testified on cross-examination that the Consent Agreement had included the wording stressed by the prosecutor only because the Real Estate Commissioner felt the inclusion of the statutory language was necessary for jurisdictional grounds so that the order would not be null and void [R. T. 12,632-12,635].

Despite such a record, in argument of the case the prosecutor told the jury again that the 1962 Consent Agreement was an admission of fraud on the part of the defendants [R. T. 14,780-14,781]. He also misinterpreted the evidence [Ex. 1-1125] by insisting Ross was wrong in stating that the Consent Agreement did not contain one word about fraud and misrepresentation [R. T. 14,381-14,382; Ex. 1-1125].

Under the circumstances, it was prejudicial misconduct for the prosecutor to use the Consent Agreement as an admission of fraud, and it was prejudicial er-



ror for the court to allow such use of the Consent Agreement, both because such evidence is inadmissible and because *undisputed testimony* shows the Consent Agreement was part of a negotiated settlement of a dispute between the California Real Estate Commissioner and the Gamble Ranch Corporation. Accordingly, the settlement negotiations, discussions, and terms of the settlement were inadmissible as admissions against appellant.

The prosecutor had a year between issuance of the indictment and commencement of the trial in which to prepare his case. He must have known the true facts. Early in the trial he offered to present the California Real Estate Commissioner to testify in support of the Government's position [R. T. 5835-5836]. But the Commissioner was never called. The prosecution had available to it several witnesses of the California Real Estate Commissioner. Although these witnesses testified on other matters the prosecution never sought by their testimony to refute defendants' contention that the Consent Agreement was signed only upon an understanding that there was no admission of fraud.

It is a familiar rule of trial and appellate practice that where testimony is uncontradicted and unimpeached, it may not be arbitrarily disregarded, but should be regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered. *Joseph v. Drew*, 36 Cal. 2d 575, 579 (1950). Since the evidence

was uncontradicted here that defendants signed the Consent Agreement only in compromise of a dispute which the Real Estate Commissioner of California, it is conclusive that the execution of the Consent Agreement may not be deemed an admission of fraud. Yet the prosecutor persisted in arguing to the jury that the defendants had admitted fraud.

The courts generally hold it is misconduct for the prosecutor to draw impermissible and illogical inferences from undisputed facts. (*King v. United States*, 372 F. 2d 383, 390 (D.C. Cir. 1967) (deliberate misinterpretation of medical evidence); *Smith v. United States*, 312 F. 2d 867, 869 (D.C. Cir. 1962) (prosecutor implied, contrary to fact, that medical report not admitted in evidence on question of the physical condition of complaining witness, because of defense objection, would have been damaging to defendant's case); *Dunn v. United States*, 307 F. 2d 883, 887 (5th Cir. 1962) (arguing evidence showed admission of guilt in absence of prerequisites for finding any admission at all); *Ginsburg v. United States*, 257 F. 2d 950, 953 (5th Cir. 1958) (in tax evasion case error to argue deposits in joint bank account with defendant's brother were unreported income where defendant denied making the deposits and there was no evidence to the contrary)).

This is a case where the prosecutor offered improper and damaging evidence, and then argued impermissible inferences to the jury after his theory of this inadmissible evidence was shown to be entirely without support. This is misconduct upon misconduct and requires reversal.

**B. After Claiming Surprise, the Prosecutor, on Re-Direct Examination of His Own Witness, Impeached Beyond the Point of Alleged Surprise by Informing the Jury the Witness Was a Co-Defendant Who Had Already Been Convicted in This Case.**

Arnold Clejan was named in the indictment. Before the jury was sworn he pleaded *nolo contendere* to twenty-two counts of the indictment and was sentenced accordingly\* [R. T. 415-435]. Clejan was called as a Government witness by the prosecutor. The Government did not on direct examination bring out the fact that Clejan had already been convicted of mail fraud herein. However, before redirect examination of Clejan, the prosecutor approached the bench, and informed the court that he wished to impeach Clejan by proof of prior inconsistent statements and specific contradiction in the evidence [R. T. 4555-4560]. The prosecutor gave no indication that he intended to bring out before the jury the fact that Clejan was a co-defendant who had been convicted of mail fraud in this very case.

The judge allowed the prosecutor to impeach as requested, on redirect. At the close of the prosecutor's redirect examination, the following took place without any warning to the court or defense counsel:

Mr. Nissen:

"Q. Mr. Clejan, just so we will know, you are the Arnold Clejan named in the indictment in this case, is that correct, sir?"

A. Yes, sir.

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\*The sentence was \$800 fine and one year in jail on each count concurrently, with the jail time being suspended.

Q. And you have been convicted of a felony, sir?

Mr. Hunt: If the court please, I wish to approach the bench.

The Court: You don't have to. The objection is sustained.

Mr. Hunt: Your Honor please, I cite this as misconduct on the part of the Government and prejudicial error." [R. T. 4579].

Thereupon the court declared a recess, excused the jury, and conferred with counsel in the absence of the jury. Counsel for defendants pointed out that these questions were deliberately asked for the purpose of leading the jury to the inescapable conclusion that Clejan had been convicted of the same charges made against the remaining defendants and that very serious prejudice to the defendants resulted from the jury knowing that a co-defendant had been convicted of mail fraud charges in the same case. The conference with the court and counsel revealed that the prosecutor knew of no other conviction of Clejan and was referring to the felony conviction resulting from Clejan's indictment. The manner in which he asked the impeaching question—first establishing that the witness was "the Arnold Clejan named in the indictment"—shows that he anticipated an objection and that the objection would be sustained. All defendants joined in a motion for a mistrial [R. T. 4579-4583]. The court denied the motion for a mistrial but did rule that this was improper impeachment of the witness Clejan.

Thereafter the court instructed the jury as follows:

"Ladies and Gentlemen, I will tell you again—I think that I told you before—you are to draw no



inference from questions that are asked by counsel, as questions by counsel are not evidence in and of themselves. You are to disregard this question that was pending at the time of recess, which Mr. Nissen asked Mr. Clejan, as to whether or not he had ever been convicted of a felony. You are to disregard that question entirely. There is no evidence on that point. You are to draw no inference at all from the question." [R. T. 4590].

Of course this instruction could not cure the harm done. It necessarily emphasized in the jury's mind the prosecutor's statement regarding Clejan's conviction.

Another incident later in the trial showed clearly that the conduct of the prosecutor in bringing out Clejan's conviction without warning to defendants was not accidental or unintentional misconduct. This occurred with reference to the witness Rockel, who had been an officer of the corporation and who had also been indicted and who, like Clejan, had been convicted before trial on a plea of *nolo contendere*. During the direct examination of appellant Reisman, appellant was asked by his attorney whether he had good faith belief in Rockel's honesty *at the time Rockel was hired* to work for the Gamble Ranch Company. Witness Reisman went beyond the question and volunteered the statement that he still believed in Rockel's honesty. Before cross-examination of Reisman could begin defense counsel obtained a conference before the bench in which the prosecutor was asked directly whether he intended to bring out on cross-examination of Reisman the fact of Rockel's plea of *nolo contendere* to the indictment for mail fraud in the same case. The prosecutor at first attempted to avoid answering the question but when he was forced to by the court he admitted that he intended to ask Reisman about Rockel's conviction in

this case to impeach Reisman's statement that he still believed in Rockel's honesty. Defense counsel objected. The judge took the matter under submission and eventually ruled that the prosecutor could not thus inform the jury of Rockel's conviction. [R. T. 13346-13352, 13675-13682, and R. T. 13788-13792].

In *United States v. Toner*, 173 F. 2d 140 (3rd Cir. 1940) the court stated:

" . . . [It] is the right of every defendant to stand or fall with the proof of the charge made against him, not against someone else. Acquittal of an alleged fellow conspirator is not evidence for a man being tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged. The defendant has a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." (173 F. 2d at 142).

To the same effect are *Babb v. United States*, 218 F. 2d 538, 541-542 (5th Cir. 1955); *Fletcher v. United States*, 332 F. 2d 724 (D.C. Cir. 1964); *Kirby v. United States*, 174 U.S. 47, 43 L. Ed. 890 (1899); *Leroy v. Govt. of Canal Zone*, 81 F. 2d 914 (5th Cir. 1936); *United States v. Pannell*, 178 F. 2d 98 (3rd Cir. 1949); *United States v. Tomaiolo*, 249 F. 2d 683, 692 (2nd Cir. 1957); *United States v. Tucker*, 267 F. 2d 212 (3rd Cir. 1959); *Grunewald v. United States*, 353 U.S. 391, 420, 1 L. ed. 2d 931, 952 (1957).

The United States Supreme Court in *Grunewald* said that attacking the credibility of a non-party witness by cross-examination to bring out facts of his possible or admitted culpability as an accomplice is improper " . . .

because the probative value on the issue of [the witness'] credibility [is] so negligible as to be far outweighed by its possible impermissible impact on the jury.'” (*Grunewald v. United States*, 353 U.S. 391, 420, 1 L. ed. 2d 931, 952 (1957)).

In *Babb v. United States*, *supra*, a co-defendant who was a witness for the Government

“... was permitted to testify over objection that he had plead guilty to all counts of the indictment. This was error. . . . Appellant not only objected to [co-defendant's] testimony as to his plea of guilty but requested the court to instruct the jury that they should not consider that fact for any purpose as bearing upon his guilt. We think this charge should have been given. A defendant is entitled to have the question of his guilt determined on the evidence against him, not on whether a Government witness or co-defendant has pleaded guilty to the same charge. Reversed.” (218 F. 2d at 541-542).

In *Fletcher v. United States*, 332 F. 2d 724 (D.C. Cir. 1964), an alleged accomplice, who was not a co-defendant in a robbery prosecution, was called as a witness. The alleged accomplice refused to answer questions possibly incriminating himself and the defendant in the robbery. It was held prejudicial error for the prosecution even to call the witness because no non-privileged testimony of the witness established any part of the Government's case, the testimony of the witness was the sole possible corroboration of the robbery victim's testimony against defendant, the Government knew the witness would take the Fifth amendment, and the jury would conclude that both witness and defendant were guilty.

In *Leroy v. Govt. of the Canal Zone*, 81 F. 2d 914 (5th Cir. 1936) the information charged three per-

sons with stealing currency. Two were tried first and convicted. In the later trial of the third person, it was held error to admit the record of conviction of the first two in the prior trial.

In the present case the prosecutor made sure the jury knew that the witness Clejan was a co-defendant named in the same indictment as the defendants and also made sure by his question that the jury knew that Clejan had been convicted. There was no excuse for the prosecutor doing this as impeachment of Clejan. The prosecutor had called Clejan as his own witness. Ordinarily, when the prosecution calls a convicted felon as a witness it is incumbent upon the prosecution to disclose the felony conviction by questions. The theory is that the prosecution vouches for its witnesses and therefore should disclose any facts which bear materially upon the credibility of such witnesses. This is to prevent unfair prejudice to the defendant. However, *where the witness is a co-defendant*, the inference of collective guilt is so overwhelming that prejudice to the defendant outweighs the probative value of such evidence on the issue of the witness' credibility and precludes the prosecution from revealing the co-defendant's conviction. (*Grunewald v. United States, supra*). Accordingly, in this case the prosecution, on direct examination, properly refrained from divulging to the jury that Clejan was a co-defendant who had been indicted together with the remaining defendants and did not disclose that Clejan had been convicted of a felony. To have done so would have been highly improper. These matters were not brought out by defense counsel on cross-examination for the obvious reason that to have done so would have prejudiced defendants. Nevertheless, on re-direct examination the prosecutor chose



a devious method for disclosing Clejan's conviction to the jury. Claiming the right to remove alleged surprise and damage the prosecutor sought the right to show contradictions and prior inconsistent statements on re-direct of Clejan. But the prosecutor did not indicate or disclose in any way that he intended to impeach Clejan by revealing his felony conviction in this case. As has already been pointed out, the prosecutor, an experienced trial lawyer, knew full well (1) that defendants would object to any proposal to impeach by showing the felony conviction, and (2) that the judge would undoubtedly sustain such an objection. This is so for the reasons stated above and also because the objectionable matter regarding Clejan's felony conviction could not properly be used to remove any of the surprise and damage claimed to have been caused by his testimony. The proper rule is stated in *Culwell v. United States*, 194 F. 2d 808 (5th Cir. 1952):

"It is the established rule that impeachment of one's own witness may be resorted to where his testimony has surprised the party offering him. However, the *impeaching matter is to be limited to the point of surprise* and even where there is a real surprise it is not proper to permit the impeachment testimony to go beyond the only purpose for which it is admissible, i.e., the removal of the damage the surprise has caused. . . ." (*Culwell v. United States*, 194 F. 2d at 811. Emphasis added).

The manner in which the prosecutor inserted Clejan's conviction into the trial shows that it was a deliberate, intentional "foul blow" struck by the prosecution with intent to prejudice the defendants. It de-

prived defendants of the right to have their guilt or innocence determined by the evidence presented against them not by what had happened with regard to a criminal prosecution against someone else. Here, the judge did sustain an objection to the improper impeachment but it was then too late; the damage had been done.

**C. After Calling Defendants' Advertising Man as a Government Witness, the Prosecutor Insinuated, Contrary to Fact, That the Witness Had Been Guilty of Mail Fraud in Advertising for Other Land Developments.**

John Roche was called as a witness for the prosecution. His occupation was advertising and for many years he had specialized in the advertising of real estate developments [R. T. 1145-1146]. Roche was called by the Government to testify regarding his preparation of advertising material used by the defendants in the Gamble Ranch land promotion [R. T. 1145 to R. T. 1360]. At no time during his direct or cross-examination was anything brought out tending to discredit Mr. Roche's personal reputation for honesty and credibility. Near the very close of the defendants' case Roche was called as a witness for the defendants to authenticate the original of defendants' Exhibit E-1 [R. T. 14236-14239]. It was necessary to call Mr. Roche only because of the court's questioning whether the defendants had established a sufficient foundation for Exhibit E-1 [See R. T. 14244]. On cross-examination, the following took place:

"Mr. Nissen:

Q. Sir, [addressing Roche] some of your advertising has previously been involved in mail fraud cases, has it not?

Mr. Hunt: If the court please, I am going to certainly cite that as misconduct. That certainly is not within the scope of cross-examination here at all.

The Court: No. The objection is well taken and the jury is instructed to disregard the question. As I have told you before several times, any questions of counsel are not evidence." [R. T. 14242].

Thereafter defendants asked for a conference out of the hearing of the jury and moved for a mistrial on grounds of the prosecutor's intentional and prejudicial misconduct [R. T. 14243-14244]. The Judge ruled again that the question was improper but denied a mistrial [R. T. 14242-14244]. The defendants pointed out that when they cross-examined Roche at the time he testified for the prosecution they had used his testimony to show that they had gone ". . . to a reputable advertising representative, Mr. Roche." [R. T. 14244-14245]. Defendants also pointed out that neither they nor the prosecution had impeached Roche before when the prosecution called him as a witness; that the Government had refused to stipulate that a copy of Roche's diary offered in evidence [as Deft. Ex. E-1] was authentic; that this compelled the defendants to call Roche to authenticate the copy; and that without warning to defendants and without asking the court for a ruling in advance the prosecution asked the question about Roche's advertising having been involved in mail fraud cases. [R. T. 14244-14245].

In answer to the defendants' position the prosecutor stated that he was justified in impeaching Roche because the defendants had asked him if Albert Allen

(attorney for co-defendant Arnold Clejan) had reviewed Roche's advertising. The prosecution was disputing that any of the advertising was reviewed or controlled by Clejan or his attorney Allen, so the prosecutor took the position that he was entitled to attack Roche's credibility when Roche testified to matters inconsistent with the prosecution's case [R. T. 14245-14246]. The prosecutor revealed that he had a particular case in mind when he asked the question of Roche: "Sir, some of your advertising has previously been involved in mail fraud cases, has it not?" [R. T. 14242]. The prosecutor stated, at R. T. 14246-14247:

"... the case I was questioning about was in the U.S. District Court in the Southern District of California. . . . and his advertising was subject of misleading advertising [sic] . . . [the question of Roche was asked] to [attack] Mr. Roche's credibility . . . that here the defendants are accused of misrepresenting advertising, and Mr. Roche who has had advertising which has been the subject of prosecution for misrepresentation, and then to cast down on his credibility when he comes in and tries to corroborate the defendants' story that Mr. Allen was passing on the ad."

The court stated that it was familiar with the case referred to by the prosecutor but that: "I don't think it was a proper question [to ask Roche] under the circumstances."

The case referred to by the prosecutor is undoubtedly *Harris v. United States*, 261 F. 2d 792 (9th Cir. 1958), another prosecution for alleged mail fraud in connection with the promotion of a real estate develop-



ment. Roche had been hired by the defendants in *Harris* to prepare advertising for their real estate development. However the *Harris* opinion reveals that Roche was not indicted and was not a defendant. See 261 F. 2d at 796.

The impeachment of Roche was by means of incompetent evidence (acts of purported misconduct not resulting in a felony conviction), by cross-examination beyond the scope of direct examination, and was further improper because it insinuated more than the prosecutor could honestly have proved even if such proof was competent; *i.e.*, it insinuated that the witness Roche was somehow culpable in previous mail fraud cases, when in fact he had been “involved” in only one case and even then, not as a defendant. That the impeachment was known by the prosecutor to be improper and incompetent is shown by the fact that the prosecution did not offer the impeaching evidence at the time he himself offered the witness in the prosecution’s case but waited until he could compel the defense to call him as a witness and then attempted to impeach him and claimed that the impeachment was “a matter of right.” This is intentional and deliberate misconduct on the part of the prosecutor.

The jury, knowing that Roche had done advertising for the defendants, could have believed from the testimony of Roche and other witnesses, that Roche was, and that defendants believed he was, a reputable advertising man. This was an important element in appellant’s defense of good faith, *i.e.*, that appellant in good faith tried to avoid any sharp or shady advertising practices by relying on a reputable advertising man. The prosecution effectively destroyed this impression

by use of the improper and prejudicial question: "Sir, [Mr. Roche] some of your advertising has previously been involved in mail fraud cases, has it not?" The question left the jury free to speculate as to how the Roche advertising had been "involved" in mail fraud cases. They could believe that the advertising itself was false, and that Roche had been a defendant or even been convicted. Since the United States Attorney ought to know when someone has serious involvement in a mail fraud case the jury would be unreasonable if it did *not* accept the prosecutor's innuendo as *fact*. But what the prosecutor referred to in this question was a case where he knew Roche had not been found guilty of mail fraud, had not been indicted, and had not even been a defendant. However, the jury could not be informed of the true facts without prejudicing defendants by emphasizing the objectionable material even more. The damage was done once the prosecutor asked his insinuating question.

The kind of prosecutor's tactic here objected to has been held to be misconduct in several cases. In effect the prosecutor, by the form of his question, stated and argued to the jury facts which were not only not in evidence but which could not have been placed in evidence. This is always error and misconduct on the part of the prosecutor. See *Smith v. United States*, 312 F. 2d 867 (D.C. Cir. 1962) (prosecutor's insinuation, contrary to fact, in argument that medical records properly excluded from evidence on defense counsel's objection, had been objected to because they were damaging to defendant). It is always error, and often prejudicial error, to insinuate that a defendant is linked with other alleged wrongdoing not a part of the charges against the defendant in the particular prosecution. See

*Watson v. United States*, 234 F. 2d 42, 45 (D.C. Cir. 1956) (on cross-examination of defendant in rape-murder case, prosecutor insinuated defendant was linked with another unsolved rape); *Wagner v. United States*, 263 F. 2d 877 (5th Cir. 1959) (in fraud case prejudicial error for prosecutor to insinuate in argument that defendant was guilty of other and more profitable frauds besides the one being prosecuted).

That the prosecutor's tactic here was prejudicial misconduct is shown by *Turner v. United States*, 35 F. 2d 25 (8th Cir. 1929), where defendant was charged with mailing allegedly obscene matter, a newspaper article. In *Turner*, the defense counsel asked a witness to compare the allegedly obscene article with an identical article published in another newspaper, the *San Diego Herald*. The following colloquy took place between prosecutor Statler, the court, and defense counsel Frumberg:

“Mr. Statler: If the Court please, to save time, we will admit that article was published in the San Diego Herald.

The Court: All right, the same article, in other words.

Mr. Statler: We are willing to make a further admission at this time—that is, that the editor and publisher of the San Diego Herald is under indictment for the publication of that same article in California.

Mr. Frumberg: I object to that, and ask the Court to grant a mistrial in this case.”

On appeal, Turner's conviction was reversed because of this act of the prosecutor. (35 F. 2d at 27.)

*Turner* is precisely in point here. In *Turner*, when the evidence disclosed that the allegedly obscene article had also been published in the San Diego newspaper, the prosecutor informed the jury that the San Diego editor was under indictment for publishing the article. In the present case, where the propriety of Roche's advertising was in issue, the prosecutor deliberately informed the jury that "... some of [Roche's] ... advertising [had] previously been involved in mail fraud cases." The *Turner* Court's reversal of the conviction is based on reasoning equally applicable here:

"There is no doubt that the remark of the prosecuting attorney was highly prejudicial. It was so regarded by the court, and the jury was cautioned to disregard it. Notwithstanding the caution, the statement had the effect of getting before the jury inadmissible evidence of an irrelevant fact; namely the indictment of the editor of the San Diego paper. The statement of counsel was not inadvertent, was not made in the heat of argument, but it was deliberate; and in our opinion it was intended by counsel in making the statement to influence the jury improperly. In all human probability it did influence the jury. . . . Because of the improper prejudicial remarks of counsel above considered, we have reached the conclusion that the judgment should be reversed." (35 F. 2d at 27).

Here, as in *Turner*, the inadmissible evidence of an irrelevant fact is the purported but unproved wrongdoing involving events not material in the trial. Likewise, the question by the prosecutor here was not inadvertent, but was deliberate misconduct intended to prejudice the jury. As in *Turner*, the misconduct here requires reversal.



**D. In Cross-Examining Appellant Reisman the Prosecutor Made Baseless Insinuations That Appellant Had Tampered With Evidence and Perjured Himself.**

During the cross-examination of appellant, the prosecutor did everything he could to charge appellant with various kinds of dishonest conduct. The prosecutor had absolutely no basis for doing so. His attempts to discredit appellant without basis and on collateral, immaterial matters conforms to a pattern established early in the case by the prosecution. A few examples follow.

**Accusing Appellant of  
Tampering With Evidence.**

At one point in his cross-examination of appellant, the prosecutor placed before appellant Exhibit 2-131, a Gamble Ranch file that had been in the Government's custody since the grand jury hearing. In the file were documents marked A, B, and D. Apparently there was no document marked C in the file. The prosecutor thereupon sought to create the inference that appellant had stolen or removed the document. He said:

“The file thereafter skips from -B to -D. Have you ever seen the -C page?” [R. T. 13,712-13].

Counsel for appellant then pointed out that the file was marked by the Government and appellant remarked that page C had apparently been omitted in the marking process [R. T. 13,713]. But the prosecutor was not satisfied. So that there would be no doubt that he was accusing appellant of tampering with the file, the prosecutor said:

“Q. Will you tell us, sir, under oath you have not seen a page of the copy marked -C in your life?” [R. T. 13,714].

Appellant's answer to this unfounded accusation was that he had no idea whether there was ever a paper marked C in the file [R. T. 13,714]. The prosecutor had no idea either. After counsel for appellant cited the prosecutor for misconduct [R. T. 13,720], the prosecutor sought to explain his motives outside the presence of the jury. His explanation falls hopelessly short of establishing a basis for the charge against appellant. He told the court, "with some reluctance," that on one occasion a document labeled A was missing from a file marked Exhibit 2-853, and on another occasion the document was allegedly "back in the file." [R. T. 13,792-93]. What this alleged incident involving one file had to do with charging appellant with removing a paper from another file is anyone's guess. But any question of a connection between the two incidents was resolved when the prosecutor admitted *he did not even know who removed the paper from Exhibit 2-853.*

"I am not going to say who did it. *I don't know.* . . ." [R. T. 13,793]. (Emphasis added).

In other words, the prosecutor had no evidence that anyone had tampered with either file and certainly no evidence that any specific person had tampered with files. But he accused appellant of doing so. This unconscionable conduct itself compels reversal.

#### **Accusing Appellant of Perjury.**

Reisman testified that Mr. Bircher of the California Real Estate Commissioner's office had discussed with Mr. Reisman the advertising of the Gamble Ranch Company and had told Mr. Reisman he (Bircher) was

satisfied with the advertising after conducting his review. The prosecutor asked Reisman:

“You know, of course, that Mr. Bircher is dead and can’t contradict you, don’t you?”

Upon objection by defense counsel the jury was instructed to disregard the remark [R. T. 13396]. The question was asked for only one purpose: to create the impression that appellant testified falsely to what Bircher had said because he knew Bircher couldn’t contradict the testimony. This amounts to an accusation that appellant perjured himself. As with other accusations made by the prosecutor, there was absolutely no evidence to support this one.

**Intentionally Bringing  
Incompetent Evidence  
Before the Jury.**

On several occasions questions of the prosecutor to Mr. Reisman were actually hearsay testimony by the prosecutor himself and argument in rebuttal to Mr. Reisman’s testimony. For example, the prosecutor showed defendant Reisman a Los Angeles Herald Express newspaper article and photograph depicting the Gamble Ranch property favorably, and asked appellant if he had protested the photograph and article as being a misrepresentation of facts. Reisman answered that he did not previously know of the existence of the article and did not know where the newspaper had obtained the photograph. The prosecutor then stated:

“The picture . . . comes from Mr. Roche’s photographs . . . it is a picture of Mr. Roche’s black and white pictures that appear in the sales kit. . . .”  
[R. T. 13598-13599].

The same sort of exchange between prosecutor and witness occurred immediately thereafter with respect to another newspaper article [R. T. 13599]. This procedure was objected to by defense counsel as constituting gratuitous hearsay testimony by the prosecutor regarding matters not in the record, or if the matters were in the record then constituting argument of the case to the jury in the guise of testimony [R. T. 13598, 13600, 13602-13603]. Without sustaining the objection the court said, "The jury will determine it." [R. T. 13,599]. Such incompetent matter should not have been presented to the jury at all. Appellant was convicted on the basis of hearsay newspaper articles for which he was in no way responsible and of which he had no knowledge.

The kind of cross-examination to which appellant Reisman was subjected by the prosecutor is strongly disapproved by the courts. It is error to attack a witness' credibility by cross-examination as to specific instances of purported discreditable conduct which did not result in a felony conviction. (*Abdul v. United States*, 254 F. 2d 292 (9th Cir. 1958) (in prosecution for alleged failure to fix tax return prosecutor's misconduct consisted in cross-examining defendant regarding alleged misleading advertising and sharp business practices). Accord: *Thurman v. United States*, 316 F. 2d 205 (9th Cir. 1963); *Ross v. United States*, 180 F. 2d 160 (6th Cir. 1950).) In *Block v. United States*, 221 F. 2d 786, 790 (9th Cir. 1955) (conviction reversed on other grounds) the court expressly disapproved such tactics stating:

"The practice of attempting to convict a defendant not of the crime of which he is charged, but



rather of being an all-round no good dissolute person, is foreign to our system and is disapproved by this Court.”

The examples of misconduct by the prosecutor presented here are only a few of the many that took place during the trial. Such unfair tactics should not be sanctioned. They were grossly prejudicial to appellant and should result in reversal.

**E. The Prosecutor Insinuated Without Basis in the Record That Appellant, His Counsel or Counsel's Investigator Tampered With Evidence.**

As part of the prosecution's case-in-chief the prosecutor called numerous purchasers to testify to alleged misrepresentations as to the quality and value of the Gamble Ranch property. To rebut this, the defendants called several purchasers who testified (1) that the land they purchased and inspected was as it had been represented, and (2) that they were not misled as to the character of the property by representations which the prosecution had attempted to prove were actually misrepresentations. These purchasers were persons who had continued to make their payments on the land and were not dissatisfied with their purchase. In preparing this part of the case defendants obtained from the court a subpoena for Gamble Ranch files in possession of Holly Corporation, a subsidiary of the Mt. Vernon Company, successor in interest to the Gamble Ranch Development Company. The subpoena was placed in the hands of a process server, Roger Feinbloom, who served the subpoena on the Holly Corporation. Instead of appearing in court with the records

itself, the Holly Corporation's representative handed them to the process server on the process server's representation that he would take the files to court immediately himself. The process server testified that he did take the files to court immediately and delivered them to counsel for appellant Reisman [R. T. 9600-9603. 9656-9662].

During testimony of one of the first purchaser witnesses for the defense, Mr. Sekiguchi, the prosecutor, on voir dire examination implied that there had been tampering with the files [R. T. 9397, lines 15-18; R. T. 9399, lines 18-21; and R. T. 9399, line 24, to 9400, line 1]. The impression left in court was that "... he [the prosecutor] doesn't believe [defendants] are submitting authentic evidence." [R. T. 9400, lines 15-19]. The prosecutor did not deny that it was his intention to leave such an impression.

The defense fully authenticated the documents as being genuine files of the Gamble Ranch Corporation. Mr. James Floyd Ragen of the Holly Corporation, was called as a witness and testified that the Holly Corporation had received these files from the Gamble Ranch Company; testified to the continued possession and custody of the files by the Mt. Vernon (Holly) Companies during their operation of the Gamble Ranch after taking it over from the Gamble Ranch Development Company [R. T. 9603-9624]; that Holly had released some of the Gamble Ranch files to the United States Postal Inspectors pursuant to order of the grand jury, had released some of the files to Mr. Landsman, a witness for defendant Benaron, and had released some of the files to the process server, employed by counsel for defendant Reisman [R. T. 9600-9603].

During cross-examination of Mr. Ragen the prosecutor asserted that the United States Grand Jury had ordered the Holly Company to retain custody of the Gamble Ranch purchaser files and not to release them without first consulting the United States Postal Inspectors or the United States Attorney [R. T. 9634.]. The plain implication of this assertion was that appellant's counsel obtained the files from the Holly Company in violation of the law by disobedience of some grand jury order. First, other than the prosecutor's bare assertion, there was no evidence that the Grand Jury ever made any such order. Secondly, this implication of wrongdoing, sure as it was to prejudice the jury, was just as surely known by the prosecutor to be unwarranted, erroneous and improper even if the grand jury had made such an order. Such an order by the grand jury would be void and of no force and effect. The Holly Company had an absolute legal right to consent to inspection of their documents by defense counsel because the law did not give the grand jury any right to impound documents brought to the grand jury proceedings and not marked as evidence. The Grand Jury itself has no power to issue or enforce a *subpoena ducas tecum*. These are issued only by the District Court in aid of a grand jury investigation; and the District Court may refuse process to the grand jury, or impose limits upon the scope and time limits of such process. (See Rule 17(c), Federal Rules of Criminal Procedure; *United States v. Smyth*, 107 F. Supp. 283, 293 (N.D. Cal. 1952); *In re National Window Glass Workers*, 287 Fed. 219, 225 (N.D. Ohio 1922); *United States v. Medical Society of D.C.*, 26 F. Supp. 55, 56-57 (D.D.C. 1938); *In re Eastman*

*Kodak*, 7 F.R.D. 760, 762 (W.D.N.Y. 1947); *Hale v. Henkel*, 201 U.S. 43, 76-77, 50 L. ed. 652, 666 (1906).)

Furthermore,

“ . . . Documents, records or papers produced in obedience to a subpoena duces tecum remain the property exclusively of the person who produces them and they must be returned to him as soon as proper use and examination of them for the purpose for which they were summoned has been completed. [Citations]

“In fact, obedience to a subpoena duces tecum would be complete if the papers called for were presented to the Grand Jury at its session and taken away again at the end of the particular session. See *In re American Sugar Refining Company*, C.C.N.Y. 1910, 178 F. 109. It is thus apparent that a party under subpoena duces tecum is entitled to the return of all its papers as soon as the Grand Jury [is] dismissed without having returned an indictment . . . Neither the Grand Jury nor the Department of Justice has the authority to impound papers which it is deemed in the public interest to preserve. Matter of *Atlas Lathing Corp. v. Bennett*, 176 Misc. 959, 29 N.Y.S. 2d 458. That such power exists only in the court is clear.” (*Application of Bendix Aviation Corporation*, 58 F. Supp. 953, 954 (S.D.N.Y. (1945))).

The prosecutor also must have known that

“Documents produced pursuant to a grand jury subpoena remain the property of the person producing them, see *Application of Bendix Aviation Corp.*, D.C.S.D.N.Y. 1945, 58 F. Supp. 953; Mat-



ter of Randall, 1903, 84 App. Div. 245, 84 N.Y.S. 294, and their inspection by persons other than the grand jury and the prosecuting attorneys is therefore dependent upon the consent of the owner or upon a court order.” (*United States v. Interstate Dress Carriers, Inc.*, 280 F. 2d 52, 54 (2nd Cir. 1960) ).

Accordingly it was improper, and misconduct, for the prosecutor to imply that the Holly Corporation was forbidden to disclose the Gamble Ranch files to appellant’s counsel, since there were no valid or legal reasons precluding inspection by anyone, with the consent of Holly.

Moreover, the prosecutor implied in his cross-examination that he believed that there may have been tampering with the files because they had been released to the appellant’s process server and investigator for transportation to court instead of being brought directly to court by an official of the Holly Corporation [R. T. 9637]. Mr. Hunt, counsel for appellant Reisman, made a statement in open court explaining how the file came from the Holly Company to court [R. T. 9637-9638]. Immediately thereafter the prosecutor insinuated there had been tampering with the files and that a letter from a certain purchaser had been removed from one of the files obtained by defendants from the Holly Company [R. T. 9638-9639].

The prosecutor followed this up by impeaching the witness Ragen through a showing that he had suffered a felony conviction in 1959 [R. T. 9646-9647]. The prosecutor had previously called the same witness, Mr. Ragen, in the Government’s case, and at that time had not impeached Mr. Ragen [See R. T. 2526-2537].

Although it was the right of the Government, on cross-examination, to impeach a defense witness by showing a felony conviction, the situation is different where the Government has previously called the same witness and not brought up the matter of the felony conviction and subsequently raises the matter to add weight to the Government's insinuation and implication that somehow there was wrongdoing and tampering with the files, either by the witness-custodian or by the defense.

All this was extremely prejudicial. It was misconduct because the Government offered no proof for any of the implications and insinuations regarding tampering. The defendants completely authenticated the files by showing the chain of custody from the time the files left possession of the Gamble Ranch Development Company until the time they appeared in court. There was no showing at all by the prosecution that any document had been removed from the files or that there had been any tampering with the files [See R. T. 9600-9603, 9656-9661]. There was no such showing because the files had not been tampered with.

The tactics employed by the prosecuting attorney were clearly designed to implant in the mind of the jury the idea that defense counsel were guilty of bad faith and tampering with the evidence. It is prejudicial misconduct to attack the integrity of the opposing counsel without warrant since the implication that defense counsel is lacking integrity necessarily reflects unfavorably on defendant's case and prejudices the defense in the eyes and mind of the jury. See *New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 73 L. ed. 706, 49 S. Ct. 300 (1929) (judgment for

plaintiff in personal injury case reversed because of misconduct of plaintiff's counsel in arousing passion and prejudice of jury against defendant by insinuating defense counsel was unscrupulous in its defense and lacking in integrity).

**F. The Prosecutor Used Inadmissible and Incompetent Charges and Statements in Complaint Letters in an Attempt to Incite the Passion and Prejudice of the Jury Against Appellant and to Arouse Sympathy for Purported "Victims" of Appellant's Alleged Wrongdoing.**

In an effort to prove that the appellant had knowledge of alleged misrepresentations to purchasers, the prosecutor offered in evidence hundreds of complaint letters sent to the company. The letters were improperly received and the jury was improperly instructed concerning the complaints under the decision of this Court in *Phillips v. United States*, 356 F. 2d 297 (9th Cir. 1965).<sup>\*</sup> However, even if the court had complied with the principles of the *Phillips* case, large portions of the complaint letters should not have been admitted in evidence or should have been excised. Anything in these letters that did not tend to apprise the defendants of alleged misrepresentation was irrelevant and prejudicial and should not have been placed before the jury. But such irrelevant matter was paraded before the jury—and in an artful manner. The prosecutor carefully selected complaint letters to produce the effect he desired [R. T. 6333, R. T. 6338, R. T. 6370-6371]. The effect desired was not only to show the complaints but also to present to the jury

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<sup>\*</sup>This point is discussed in full in Argument I, *supra*.

irrelevant matter tending to arouse the jury's sympathy for the purchasers as "victims" who had, for example, "... bought this ranch so we could live there when we retired in two years." [R. T. 6357]. Thus the error in admitting such statements was aggravated by the prosecutor's use of them.

The prosecutor was warned by the court not to introduce such matters into the record [R. T. 6362-6363, R. T. 6367-6368], but he deliberately disregarded the court's instruction [R. T. 6363]. For example, he read from one letter the disgruntled purchaser's accusation that the defendants were "... all ... a bunch of schemers and unfaithful to words and promises" and guilty of defrauding "... two old persons, like myself and my wife, who last year lost our only son ...". The court twice interrupted the prosecutor during the reading of that particular letter and warned the prosecutor, "These portions are not material, Mr. Nissen." and "I will have to interrupt you, Mr. Nissen." [R. T. 6362-6363].

That defense counsel deliberately refrained from aggravating this prejudicial matter by not objecting is shown by a conference at the bench shortly afterwards. Counsel for defendant Benaron, Mr. Rothman stated,

"... I want the court to know that I don't view as an advocate in this case Mr. Nissen's remarks on that last file ... as inadvertent, when he read that the son died and that the defendants are a bunch of schemers. If your Honor please, this has happened time and time again. I think if I were to sit here and count the times I might have five or six instances of this kind of thing, which the cases have expressly held to be improper." [R. T. 6366-6368].



Defense counsel further stated they believed there was nothing the court could do to erase this prejudicial matter from the minds of the jury, and did not accept the court's offer to admonish the jury to disregard the irrelevant matter. The prosecutor protested his innocence by implying that he stumbled upon this prejudicial matter inadvertently [R. T. 6366-6368].

The record indicates that the prosecutor had carefully chosen the material he wanted to read before he read it. There was a great deal of colloquy and protests by counsel over his reading such letters into the record at all [R. T. 6333-6338]. In defending his contention that he had a right to read the letters to the jury the prosecutor stated he had made a careful selection and knew exactly what he wanted to read and that it was pertinent. He said, for instance, "I would like to read from selected files of complaint letters from purchasers." [R. T. 6333]. "And I made up a list of the ones I wanted to read from." [R. T. 6338]. It is further evident that the prosecutor had very carefully culled from a mass of documents the letters he found most favorable to the prosecution and prejudicial to appellant [R. T. 6370-6371].

It is misconduct for a prosecuting attorney to arouse the jury's sympathy in a mail fraud prosecution by depicting the defendant as a bloated predator taking advantage of innocent and defenseless people. In *Beck v. United States*, 33 F. 2d 107, 113 (8th Cir. 1929) a mail fraud conviction was reversed because of misconduct of the prosecuting attorney in presenting evidence that the defendant company had draperies and leather chairs in its offices, that some of its personnel went to the horseraces at company expense, and in argu-

ing to the jury that defendant had “sat back in his leather chair” and “robbed” a woman; and that defendant has used company money to buy a car for his personal use, etc. Such conduct was also disapproved in *New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 73 L. ed. 706, 49 S. Ct. 300 (1929), a personal injury case where the jury verdict for plaintiff was reversed because, among other things, plaintiff’s counsel prejudiced the jury by argument that depicted plaintiff as a decent girl who had suffered mental anguish because of her injuries and that further impugned the good faith of defense counsel as “. . . coming into this town . . .” and raising a defense that villified plaintiff by pointing out evidence that reasonably raised the possibility her symptoms were due to venereal disease.

In *United States v. Grayson*, 166 F. 2d 863 (2nd Cir. 1948) a mail fraud conviction, reversed on other grounds, the court expressed its disapproval of the prosecutor’s conduct in asking one of defendant’s customers whether he had a son in the [military] service, in asking another customer whether what she paid was all she had in the world, and in asking a third customer whether she was married, and in eliciting the answer that she had a husband in the service.

Under the circumstances of the present case the prosecutor’s conduct in eliciting the prejudicial matter must be deemed intentional and the error must be deemed serious misconduct.

As was stated in *Beck v. United States*, 33 F. 2d 107 (8th Cir. 1929) quoting from the United States Supreme Court opinion in *New York Central Railroad Co. v. Johnson*, *supra*:

“The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice . . . where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error.” (33 F. 2d at 114).

The selective reading by the prosecutor of incompetent, irrelevant material from the complaint letters was designed to assure that the jury would decide the case on the basis of passion and prejudice. The attempt undoubtedly had the desired effect. This was misconduct and prejudicial. The judgment of conviction should be reversed.

**G. The Prosecutor Attempted to Use Incompetent Matter to Arouse in the Jury a Belief That All Out-of-State Land Subdivisions Are Fraudulent to Prejudice the Jury Against Appellant.**

Mr. Trescartes was called by the Government as an expert on land value and the Government offered his testimony to prove that the land was worth far less than it was being sold for by defendants [R. T. 6706-6735]. Cross-examination of Mr. Trescartes by defendants established that there had been sales of other subdivision lands in the immediate vicinity of the Gamble Ranch at prices in excess of the price at which the

Gamble Ranch land was offered [R. T. 6737-6757]. In redirect examination the following took place with reference to sales of other subdivision land for prices comparable to the Gamble Ranch offering price:

“Mr. Nissen:

Q. “In your opinion [Mr. Trescartes] would a *well-informed* buyer that knew all the facts about the property pay \$200, \$300 an acre for the Gamble Ranch?” [R. T. 6761-6762]. (Emphasis supplied).

An objection to this question was sustained on the ground it was argumentative. Again the prosecutor asked:

“Would a buyer, in your opinion, who offered to pay \$300 an acre for Gamble Ranch be well informed?” [R. T. 6762].

Another objection was sustained to this question. The prosecutor then continued:

“Mr. Nissen:

Q. With regard to these other subdivisions in the State of Nevada, so-called, Sir, are you aware how the land is being sold to people?

Mr. Trescartes:

A. Well, to a certain extent it is being sold through advertisements.

. . .

Mr. Nissen:

Q. And to your knowledge, Sir, have any of those subdivisions resulted in mail fraud prosecutions?

Mr. Trescartes:

A. I don't know.” [R. T. 6762-6763].



Here the prosecutor was clearly implying and insinuating by the form of his questions that any subdivision land sales at prices comparable to Gamble Ranch and sold through advertising must necessarily involve mail fraud and therefore, by implication, that Gamble Ranch lands involved mail fraud.

This was misconduct. To ask the question *without* knowing that there was a basis for an affirmative answer by the witness would be a deliberate and unwarranted implication that there was mail fraud involved in such other sales. But even if the prosecutor thought the witness would answer affirmatively, such a question would be deliberate injection of prejudicial and inadmissible matter. Proof of mail fraud charges without conviction is not admissible evidence that *the persons charged* have been guilty of misrepresentation and fraud. Such proof certainly cannot be used to raise even an inference that *appellant* was guilty. However, before the prosecutor could ever ask such a question in good faith he should have a sound basis for believing: that there were mail fraud prosecutions; that such prosecutions had resulted in convictions; and that the witness was aware of these facts and took them into consideration in determining value. Here the witness actually denied knowledge of any other mail fraud prosecutions. This was obviously an attempt by the prosecutor to inject, improperly, an intimation that people subdividing land and advertising through magazines and newspapers were being prosecuted for mail fraud and therefore anyone who engaged in subdivision and sale by advertising must necessarily be guilty of fraud. It is hard to over-estimate the effect that such a question by the United States Attorney may

have on a jury. The United States Attorney is a representative of the United States Government. He has the responsibility of prosecuting mail fraud cases. The jury would not regard his question as being asked in vain. Relying on the integrity and dignity of the United States Attorney's office the jury must be impelled to conclude that there have been other mail fraud prosecutions for land subdivisions similar to those engaged in by the defendants in this case. Of course, the effect on the jury is to inculcate in them a generalized belief that desert land subdivisions are suspect as a matter of course.

Later in the trial the prosecutor found another opportunity to reinforce this belief. In cross-examination of defendant Reisman the prosecutor offered into evidence a letter and attached newspaper clipping from Mr. Rockel, an officer of the company, to Mr. Reisman. The subject matter of the letter was a newspaper article regarding alleged fraudulent out-of-state land subdivisions. Over repeated objections the letter and newspaper clipping were permitted in evidence [R. T. 13800-13809; Exs. 1-1025; 3-4082]. The prosecutor offered it to show that the article was brought to Mr. Reisman's attention although it is entirely unclear how this is material. The following quotation from the transcript demonstrates the prejudicial nature of the proceedings with respect to the offer and reception in evidence of the letter and newspaper article:

"Mr. Nissen: I think, your Honor, that the Government's offer should reflect that we were offering the letter as a letter sent from Mr. Rockel to Mr. Reisman. The newspaper copy attached is offered to show here is [sic] an article involving

out-of-state land development brought to Mr. Reisman's attention. *We do not say, of course, that the newspaper article is offered to prove anything, of course, but it is information brought to Mr. Reisman's attention* (Emphasis added).

The Court: It is ordered in evidence, on that basis. Ladies and gentlemen, the newspaper article is not offered or received for the proof of the facts therein, but it is offered to show that this newspaper article came to the attention of Mr. Reisman. You may proceed.

Mr. Nissen:

Q. Mr. Reisman, the letter of November 13th and the attached news article, and in particular I noticed the newspaper clipping or article says, 'Rancho dreams may prove to be mirage . . . out-of-state land development schemes to be discussed in committee meeting.'

"Now, there comes a quote at the front of the article which says: 'Retire on your own rancho. Be the monarch of 20 acres in the lush green pastures of Arizona.' (Or Texas, or British Somaliland). 'These invitations are extended daily to Californians, many of them close to retirement age. Acreage is offered on no down payment with easy monthly terms. Everyone sympathizes with the city dweller who has spend [sic] his working lifetime pounding the pavements and dreams of retiring to a "a little place in the country." The State Division of Real Estate sympathizes with him, too; but it would like to make sure that the reality comes somewhere close to the dream.' "

“Then it mentions a period of time when so many lots were sold and so many parcels, etc., and some figures.

“The locations included Oregon, Nevada, Arizona and Utah, as well as Hawaii, Alaska, Brazil, and other South American countries.

“Land acquired by promoters at \$5 to \$10 an acre is being offered to investors here at prices from \$100 an acre upward.

The Court: Mr. Nissen, haven't we gone into this before?

Mr. Nissen: It is to show, Sir, that this was brought to Mr. Reisman's attention.

The Court: *For what purpose, to what end?* (Emphasis added).

Mr. Nissen: I have almost got to the portion that I am going to stop reading from, Sir.

The Court: Allright.

Mr. Nissen:

Q. And the next two paragraphs in particular:

“Much of this acreage never has been adequately surveyed, has no roads leading to it, has no water and is overgrown with sagebrush and desert vegetation.

‘Gerald J. McBride, Executive Secretary of the Nevada Real Estate Commission, said in the October issue of the Nevada Real Estate News, about some real estate promoters:—’

And it quotes him as saying what they do.

Upon reading this article, sir, *did you in any way believe that it was describing or referring to Gamble Ranch*, particularly the reference to Mr. McBride and what he has said?



Mr. Hunt: I think, your Honor please, *it would be immaterial as to what he thought upon reading this*. From what has been read this far, it is clearly a newspaper article about ‘out-of-state land development schemes to be discussed in committee meetings’ by a committee of the California State Legislature, and which occurred some time ago.

It is a collateral matter. The committee has made its report, its recommendations a long time ago, and if we are going into that collateral matter, we will go far afield.

I move that it all be stricken as immaterial.

The Court: The motion is denied.” [R. T. 13,805-13,809]. (Emphasis added).

The quoted newspaper article contains serious charges: that out-of-state land developments in general are schemes to bilk hard-working “little people” into investing in desert land for retirement purposes when the land is entirely unsuitable, is purchased by the promoters for a pittance and resold to the “little people” at outrageous prices by means of bald-faced misrepresentations and fraud. The article borrows dignity by quoting “high-placed” public officials and its weight was further emphasized when the United States Attorney offered it in evidence and read it into the record.

The court, having revealed it had no conscious understanding itself of any reason why the matter was anything other than inadmissible immaterial hearsay, nevertheless allowed the prosecutor to continue reading the matter into the record.

But having tired of innuendo and implication, the prosecutor went further.

“Mr. Nissen:

Q. In other words, Sir, [addressing appellant Reisman] with regard to this paragraph—

‘Much of this acreage never has been adequately surveyed, has no roads leading to it, has no water and is overgrown with sagebrush and desert vegetation were you aware that was a fairly accurate description of the Gamble Ranch at that time?’

Mr. Reisman:

A. Absolutely not. It was not an accurate description of the Gamble Ranch at that time. So far as I am concerned, this particular article did not apply to the Gamble Ranch at any time.

Mr. Nissen:

Q. In the statement that *‘these con men . . . are using people’s dreams of security and private ownership of land to fleece them of their savings and ruin their chances of providing for the future.’*

I ask you, did you regard that the company you were involved with, Gamble Ranch, was using people’s dreams of retirement and security to get them to pay money for property that was like this, covered with sagebrush and so forth.” [R. T. 13809-13810]. (Emphasis added).

Thus, the prosecutor, after having told the court that, “We do not say, of course, that the newspaper article is offered to prove anything, of course. . . .” [R. T. 13,806], made it plain by his questions that he had offered the article *for the truth of its contents*. After reading from the article about “con men,” and

“fleecing” people of their savings, and “using people’s dreams of security” for profit, he asked if appellant thought “*Gamble Ranch* was using people’s dreams of retirement and security to get them to pay money for property that was like this, covered with sagebrush and so forth.” [R. T. 13,809-10] (Emphasis added). Although the article in no way referred to Gamble Ranch, and after his protestation that the article was not offered “to prove anything,” the prosecutor asked appellant, “Were you aware that was a fairly accurate *description of the Gamble Ranch* at that time?” [R. T. 13,806, 13,809-10]. (Emphasis added).

In *Turner v. United States*, 35 F. 2d 25 (8th Cir. 1929) (discussed in argument III, C, *supra*), the court reversed a conviction for mailing obscene matter because of the prosecutor’s misconduct in stating that the publisher of a newspaper article not the subject of the prosecution was under indictment. The language of the court is particularly pertinent to the conduct of the prosecutor in this case:

“The statement of counsel was not inadvertent, was not made in the heat of argument, but it was deliberate; and in our opinion it was intended by counsel in making the statement to influence the jury improperly. In all human probability it did influence the jury. . . . Because of the improper prejudicial remarks of counsel above considered, we have reached the conclusion that the judgment should be reversed.” (35 F. 2d at 27).

When the federal courts find that the prosecution’s use of “evidence” of such nature is deliberate and prejudicial misconduct reversal results; the courts do not allow the government to obtain convictions by inculcat-

ing in the jury a generalized belief that defendant must be guilty because the prosecutor uses hearsay consisting of newspaper articles and his own unsworn statements to imply that any one in a class of persons like the defendant must be guilty. For example, in *Nations v. United States*, 32 F. 2d 598 (8th Cir. 1929) defendant was prosecuted for violation of the prohibition laws. Defendant's case had received a great deal of publicity in the local press and the United States Attorney argued to the jury that the Associated Press and the entire metropolitan press of St. Louis believed that the defendant was guilty. The Court held this was prejudicial misconduct requiring reversal.

In *Dunn v. United States*, 307 F. 2d 883 (5th Cir. 1962) a prosecution for income tax evasion, defendant, mayor of a small city, was charged with receipt of unreported income in the form of "kick-backs" on city contracts. In the presence of the jury the prosecutor made statements which could only be interpreted as asserting that all politicians take "kick-backs". The statements were cited as prejudicial misconduct and the Court of Appeals reversed.

In the present case the Court allowed the prosecutor to admit hearsay statements in the form of his own questions and in the form of newspaper articles, all of which were well and deliberately calculated to implant in the mind of the jury the belief that out-of-state land developments in general were fraudulent and were being prosecuted right and left for mail fraud violations. When the prosecutor is allowed to bring such matters before a jury he doesn't need to take the additional step of stating himself that all out-of-state land subdivisions are suspect and therefore the defendants



are also suspect. The jury cannot avoid that conclusion. Of course, the Court informed the jury that statements by the prosecutor in the form of questions were not evidence, and that the statements in the newspaper articles were not admitted for the truth of the matter but merely because they had come to the defendant's attention. Appellant contends it is futile to believe that the Court's admonition could prevent a jury from believing exactly what the Court told them not to. As was stated in *Holt v. United States*, 94 F. 2d 90, 94 (10th Cir. 1937), a mail fraud prosecution:

"We doubt that it was possible for the jury to efface the statements from their minds and to consider the case solely on the competent evidence adduced. In fact, we find it difficult so to do. We are of the opinion that the instruction of the court to the jury to disregard the statement did not cure the error in its admission, and that the motion for a mistrial should have been granted."

To the same effect is *Mora v. United States*, 190 F. 2d 749 (5th Cir. 1951) which is also a case where the appellate court held that the trial court's admonition that the jury should disregard incompetent material did not cure the error in allowing prejudicial matter to go before the jury.

We have presented in detail two instances during the present trial where the prosecutor introduced incompetent, improper and prejudicial matter to the jury in order to implant a belief and arouse the impression that out-of-state land subdivision promotions in general were fraudulent in nature. Of course this is improper. Appellant is entitled to stand or fall on the evidence of his own guilt, not evidence of the guilt of

another (*United States v. Toner*, 173 F. 2d 140, 142 (3rd Cir. 1949)). Appellant, having the right to stand upon the evidence against him, ought not to be subject to the insinuation that anyone subdividing land and advertising it through magazines and newspapers is likely to be guilty of mail fraud. Such "evidence" is hearsay, incompetent, irrelevant and immaterial, and the deliberate use of such evidence by the prosecutor is highly improper and prejudicial.

**The Prosecutor's Misconduct  
Requires Reversal.**

The prosecutor must be fair and must avoid misconduct because the dignity and responsibility attaching to his office guarantees that his misconduct will prejudice the defendant's case both because of the improper and prejudicial matters placed before the jury and because of the impact upon the jury when it is the prosecutor who furnishes them with such prejudicial information (*Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319-1321, 55 S. Ct. 629 (1934)).

Prejudice to defendant is more likely to result from the prosecutor's misconduct where the case is a close one (*Handford v. United States*, 249 F. 2d 295 (5th Cir. 1958)). However, persistent and pronounced misconduct of the prosecutor has a cumulative effect on the jury and may even require reversal where the case is not close. (*United States v. Sprengel*, 103 F. 2d 876 (3rd Cir. 1939)). So much prejudicial matter may be placed before the jury as to deprive defendants of a ". . . trial in accordance with substance and form of our criminal law . . ." and necessitate reversal despite overwhelming evidence of guilt (*United States v. Sprengel*, 103 F. 2d at 884-885). *I.e.*, where the prose-

cutor's misconduct is persistent, pronounced and protracted, the prejudice to the defendant may be so great as to deprive him of due process of law by depriving him of a fair trial (*Viereck v. United States*, 318 U.S. 236, 247, 87 L. ed. 737, 741 (1942); *Berger v. United States*, 295 U.S. 78, 88, 79 L. ed. 1314, 1321, 55 S. Ct. 629 (1934)).

Appellant submits that that is precisely what happened here, that the case was a close one where a far lesser degree of misconduct would require reversal, and that the misconduct here was so egregious that it deprived appellant of due process of law in the conduct of this trial.

In this case the principal defense was "the good faith" of appellant and his lack of intent to defraud anyone and his lack of knowledge that any misrepresentation was being made. At the close of the prosecution's case all defendants moved the court for a judgment of acquittal. The court denied the motions, preferring to submit the case to the jury. But the court noted that the question of good faith presented a very difficult and substantial question of fact for the jury [R. T. 9334-9335].

It is true that on occasion the trial court admonished the jury to disregard improper matters and that on occasion the trial court recognized that a cautionary instruction or admonition might actually worsen the misconduct rather than alleviate it and offered to give the cautionary instruction of admonition if defense counsel so desired. The nature of the misconduct in this case constituted "plain" error, so devastating in its effect as to be magnified in its influence on the jury by either objection on behalf of appellant or corrective

the ground that appellant withdrew from the venture on that date [C. T. 1035]. The court denied the motions for judgment of acquittal as to all counts except 2 and 3 [C. T. 1130]. The motions should have been granted as to all specified counts.

Appellant Reisman's involvement in the Gamble Ranch promotion is shown by the statement of facts herein. Reisman's initial involvement was as attorney for Benaron and Byrnes in drafting agreements between them and Clejan and later between them and the corporation. Except for a meeting on September 7 or 8, 1959, for this purpose, Reisman had nothing to do with the venture because he was out of the country traveling in Europe between about September 9 and October 27, 1959 [R. T. 12,942-12,944]. The trial court therefore properly granted appellant's motion for judgment of acquittal on Counts 1 and 2 which were based on mailings before October 13, 1959 [C. T. 1130].

After his return from Europe, appellant represented the Ranch from about November 6, 1959 in negotiating with the California Real Estate Commission to obtain the withdrawal of a cease and desist order against the company's sales of land in California and also to obtain a public report. Reisman represented the Gamble Ranch venture in that respect on various occasions until he withdrew from the activities of the company in the spring of 1962 [R. T. 12,953; 12,954-12,955; 12,963-12,964; 12,974-12,975; 12,977-12,978; 12,999; 13,001; 13,025-3,052; Exs. 1-237, B, B-1, AH, A, FN, CA].

On December 14, 1959 Reisman became president of the corporation [R. T. 12,993]. But he had no



ownership or equity in the Gamble Ranch venture until he acquired two per cent of the stock in June, 1960. At the end of 1960 he bought more stock which raised his percentage of ownership to thirteen per cent of the total [R. T. 13,054-13,057]. Reisman had no involvement with the company's advertising or any representations to the public until about mid-1960 when Albert Allen, attorney for Clejan, gave up the work of supervising the advertising and turned it over to Reisman. This occurred about mid-1960 [See testimony of John Roche, R. T. 1382-1385]. There is no evidence that appellant was an active member of the venture before the middle of 1960. Appellant's motion for judgment of acquittal should therefore have been granted as to Counts 40, 58 through 62, and 67, all of which are based on mailings before May 24, 1960.

The last public report from the Real Estate Commission was issued on April 23, 1962. Reisman resigned as a director of the corporation on June 15, 1962 [Pltf. Exs. 1-4, 5 and 6, minutes of meeting of corporation]. There is no evidence in the record to suggest that Reisman had any part in the activities of the corporation other than the passive interest of a shareholder after June 15, 1962. He resigned as an officer of the company at the same time he resigned as a director. Appellant's motion for judgment of acquittal should have been granted as to Counts 5, 12 through 19, 23, 26, 27, 38, 39, 41, 54, 55, 66, 71, 73, 74, 77, and 78 which were based on mailings after June 15, 1962 when appellant withdrew from the venture.

In *Lewine v. United States*, 383 U.S. 265, 15 L. ed. 2d 737, 86 S. Ct. 925 (1966), ten persons were found guilty on each count of a ten-count indictment for

violation of the Mail Fraud Act. The Supreme Court granted “. . . petitions for writs of certiorari limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined in the conspiracy or after they had withdrawn from it.” Relying in part upon a concession of the Solicitor General the Supreme Court held that “. . . an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy; . . .” (383 U.S. at 266-267; 15 L. ed. 2d at 738-739).

This decision states the law that is binding upon the Federal courts. In *Levine*, defendants were charged with conspiring to violate both the Securities Act of 1933 and the Mail Fraud Act. In the present case the effect of the indictment was to charge a complete violation of the Mail Fraud Act by reason of a conspiracy or scheme allegedly engaged in by all the defendants. The principal charging indictment in Count 1 alleged that “beginning on or about June 9, 1959 and continuing until the return of this indictment the [named defendants] . . . knowingly and wilfully intended and did devise a scheme and artifice to defraud purchasers and prospective purchasers of land known as ‘Gamble Ranch’. . . .”

The evidence in the record demonstrates that on June 9, 1959 the only defendant involved in this alleged scheme was defendant Arnold Clejan; that the other defendants joined the Gamble Ranch venture and thereby became parties to the alleged scheme at various dates after June 9, 1959. The theory of the prosecution was that all the defendants would be jointly

and vicariously liable for the acts of each other by reason of the scheme. In other words vicarious liability was imposed upon the theory of conspiracy law. Under the rule of the *Levine* case no defendant can be held liable for acts in furtherance of this conspiracy or scheme which acts took place “. . . before [such defendants] had joined the conspiracy [scheme] or after they had withdrawn from it.” The evidence is clear and undisputed that appellant Reisman had acted only as a lawyer for Benaron and Byrnes at the time of Counts 2 and 3, mailings of September 23 and October 13, 1959. The trial court properly dismissed these counts [C. T. 1130]. Thereafter, from about November 6, 1959 through about June, 1960 appellant Reisman acted as an attorney for the corporation, representing it before the California Real Estate Commission and on December 14, 1959 appellant Reisman became an officer and director of the corporation. However, he had no ownership or equity interest in the corporation until June, 1960 and not until mid-1960 did he have any participation whatsoever in the advertising of the corporation. Accordingly his role up to mid-1960 was simply that of attorney, acting in an advisory capacity and, as is done by many attorneys, accepting a position as an officer and director. Therefore, Counts 40, 58 through 62, and 67, all based on mailing before June, 1960 should have been dismissed.

Appellant Reisman withdrew from the venture on June 15, 1962 when he resigned as an officer and director. He participated no further in any of the business activities of the venture. Accordingly all counts based upon mailings taking place after June 15, 1962 should also have been dismissed. These are Counts 5, 12-19, 23, 26, 27, 38, 39, 41, 54, 55, 66, 71, 73, 74, 77, and 78.

V.

THE TRIAL COURT'S REFUSAL TO PERMIT  
APPELLANT TO EXAMINE THE GRAND JURY  
MINUTES BEFORE TRIAL DEPRIVED APPELLANT  
OF DUE PROCESS OF LAW IN VIOLATION OF  
THE FIFTH AMENDMENT TO THE  
CONSTITUTION OF THE UNITED STATES.

Introduction.

Before trial appellant made and joined in motions to inspect the transcript of testimony given before the grand jury on the ground that the transcript was needed adequately to prepare for trial [R. T. 136-143, 165; C. T. 134-37, 246, 271-72, 391-404]. It was argued that inspection should be allowed under the Due Process Clause of the Fifth Amendment to the United States Constitution [R. T. 137]. The court denied the motions [R. T. 141-142].

The Fifth Amendment commands that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .”<sup>\*</sup> The Constitution says nothing about secrecy of grand jury proceedings. Federal Rule of Criminal Procedure 6(e) permits disclosure to attorneys for the government “for use in the performance of their duties,” but disclosure to the defendant is allowed

“ . . . only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request

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<sup>\*</sup>In non-capital cases, the indictment procedure may be waived and the offense prosecuted by information (Rule 7(a), Fed. Rules of Crim. Procedure; *Smith v. United States*, 360 U.S. 1, 6, 79 S. Ct. 991, 3 L. ed. 2d 1041, 1046 (1959)).



of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.”

The Supreme Court has held that under Rule 6(e) the trial court has discretion to deny a defendant's request to examine grand jury minutes during the trial if the defendant fails to show that a “particularized need exists for the minutes which outweighs the policy of secrecy.” (*Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1327 (1959)). With rare exceptions (*e.g. United States v. Rose* (3d Cir. 1954), 215 F. 2d 617, 629-630 and *United States v. Remington* (2d Cir. 1951), 191 F. 2d 246, 250 [in prosecutions for perjury before grand jury, defendants allowed to examine their own grand jury testimony])), the federal courts have refused to permit pretrial inspection by a defendant.

The “particularized need” requirement should be re-examined in the light of modern legal thinking and increased concern for the rights of an accused. The history of grand jury secrecy demonstrates that the reasons for maintaining secrecy do not apply today. The “policy of secrecy” is based not on experience but on groundless hypothesis. The policy of secrecy is outweighed by the due process requirement that an accused be accorded a fair trial. A trial is unfair if the defendant is unable adequately to prepare for it. It is unfair to allow the prosecution to use grand jury minutes to prepare for trial while denying defendant that right.

The trial court's refusal to allow appellant to inspect the grand jury minutes before trial deprived appellant of due process of law in violation of the Fifth Amendment to the United States Constitution. To the extent that Federal Rule of Criminal Procedure 6(e) authorized the trial court's refusal, that Rule violates appellant's rights under the Fifth Amendment Due Process Clause.

**Background of  
Grand Jury Secrecy.**

The grand jury was created in England in 1166 by Henry II. Then called the Grand Assize, it first served as a prosecuting body, an arm of the Crown. It was invoked by the Crown to act as a public prosecutor for the purpose of returning indictments at the pleasure of the sovereign. During this early period evidence was heard in open court. The proceedings were never held in secrecy because the Crown could not control the results of secret deliberations (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 456-57 (1965); Elliff, *Notes On The Abolition Of The English Grand Jury*, 29 Am. J. Crim. Law & Criminology 3 (1938-39)). The grand jury functioned only in the interests of the Crown. The rights of private citizens were ignored. Independent deliberations were impossible so long as jurors were subject to reprisals from the government. An increasing desire by grand jurors for independence from the Crown thus led to a desire for secret proceedings. "Recognition of grand jury secrecy was motivated by a grave need for protecting the grand jury from the abuses of the Crown." (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 466 (1965)).

The concept of grand jury secrecy and independence first received judicial recognition in 1681 as a result of the *Earl of Shaftesbury* trial (8 How. St. Tr. 759, 771-774 (1681); 8 Wigmore, *Evidence* §2360 (McNaughton rev. 1961)). The Crown lodged charges against the Earl of Shaftesbury and convened a grand jury to hear evidence in open court. The jurors asked and were granted the right to conduct their deliberations in private chambers. Against the wishes of the Crown, the jury refused to indict. The case marked the end of the Crown's efforts to control the grand jury by requiring the publicity of their proceedings, or by polling the jurors (2 Campbell, *Lives of the Lord Chancellors* 363 (4th ed. 1857)). Investigations by grand juries, including the taking of testimony, were thereafter invariably conducted in privacy. The *Earl of Shaftesbury* case was "celebrated as a bulwark against the oppression and despotism of the Crown." (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 457 (1965); 8 Wigmore, *Evidence* §2360 (McNaughton rev. 1961)).

Thus the common law practice of grand jury secrecy was designed to protect the accused by assuring that the grand jury could conduct its investigations independently, free from pressures exerted by the sovereign. It "was never envisioned as an instrument to be invoked or waived as the prosecution saw fit." (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 456 (1965)). But for the despotic practices of the sovereign, grand jury secrecy would never have been necessary (See Sherry, *Grand Jury Minutes: The Unreasonable Rule Of Secrecy*, 48 Va. L. Rev. 668, 669).

By 1848 Englishmen were no longer afraid of their government. With the passing of the reason for the rule of secrecy came a change in the rule. The Indictable Offenses Act (11 & 12 Vict. C. 42 §§1, 27) of 1848 provided for the preliminary examination of the accused before a committing magistrate. It gave the accused the right to obtain copies of the depositions of the prosecution witnesses upon whose testimony the prisoner had been committed for trial. The Act limited the prosecution's proof at trial to the evidence disclosed at the preliminary hearing. The accused thereby obtained full pre-trial discovery of the prosecution's case (*United States v. Worcester*, 190 F. Supp. 548, 559 (D.C. Mass. 1960); Brennan, *Remarks on Discovery*, 33 F.R.D. 56, 59; Seltzer, *Pre-Trial Discovery of Grand Jury Testimony In Criminal Cases*, 66 Dick L. Rev. 379 (1961-1962)). The preliminary hearing procedure in time rendered the grand jury obsolete and, accordingly, in 1933 the grand jury was abolished in England. (The Administration of Justice (Miscellaneous Provisions) Act, 23 & 24 Geo. 5, c. 36 §1 (1933); *United States v. Worcester*, 190 F. Supp. 548, 559 (D.C. Mass. 1960); Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 469 (1965)).

**The "Policy of Grand  
Jury Secrecy" in the  
United States.**

The adoption in this country of the common law rule of grand jury secrecy appears to have been automatic and ill considered. We imported the English rule without recognizing that the conditions that made secrecy necessary in England never existed here. American



grand jurors are not afraid of their government. In England the accused desired the protection of privacy. In this country the accused, not the government, seeks disclosure of grand jury proceedings. Appellant is in no sense protected by testimony given in private. The benefit of secrecy now inures solely to the prosecution. And it is by the prosecution that secrecy is demanded. The reasons are obvious. In a secret hearing, the prosecutor has free reign to obtain *ex parte* depositions of witnesses whose testimony will never be known to the accused until he hears it given against him at the trial. The opportunities for abuse are well known. The prosecutor "may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal transactions. . . ." (*Schmidt v. United States* (6th Cir. 1940), 115 F. 2d 394, 397), The government has no legitimate interest in obtaining convictions by insuring that the accused cannot adequately prepare his case. Under such circumstances

" . . . the grand jury, instead of that *protection of the citizen against unfounded accusation*, whether it comes from government or be prompted by partisan passion, or private enmity . . . *which it was primarily designed to provide*, may become an engine of oppression and a mockery of justice." (*Schmidt v. United States* (6th Cir. 1940), 115 F. 2d 394, 397. Emphasis added).

If secret proceedings are no longer needed to protect the accused from the state by permitting independent investigation, what is the justification for the endurance of the "policy of secrecy?" The arguments

advanced in behalf of secrecy today are very different from those originally made. (See Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 458 (1965)). Five reasons are commonly given for maintaining secrecy: (1) To prevent the accused's escape before indictment; (2) To protect the reputation of the accused who is not indicted; (3) To prevent the importuning of grand jurors; (4) To prevent tampering with grand jury witnesses who later testify at trial; (5) To encourage free disclosure of facts by witnesses (*United States v. Amazon Industrial Chemical Corp.* (D.C. Md. 1931), 55 F. 2d 254, 261; *United States v. Rose* (3d Cir. 1954), 215 F. 2d 617). These arguments are analyzed below under the heading "Re-examination of Policy of Secrecy." Despite the loyalty of the courts to the policy of secrecy, however, the decisions have permitted disclosure of grand jury testimony "discretely and limitedly" (*Dennis v. United States*, 384 U.S. 855, 869, 86 S. Ct. 1840, 16 L. ed. 2d 973, 983 (1966)) upon a showing by the defendant of "particularized need." (See, e.g., *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1327 (1959)).

#### **The "Particularized Need" Rule.**

Federal criminal procedure has erected barriers to discovery by the defendant that make it possible for the prosecution to conceal a substantial part of its case from the accused. "The elimination of precise pleading, the general unavailability of particulars, and the increasing elasticity given to indictments all leave a good deal of room for 'surprise' at trial." (Goldstein, *The State & The Accused: Balance Of Advantage In Crim-*

*inal Procedure*, 69 Yale L.J. 1149, 1180). But in federal civil cases—involving money and property instead of life and liberty—broad pretrial discovery is allowed so that surprise will be minimized (Fed. R. Civ. P. 26-37; 4 Moore, *Federal Practice* §§26.02-.03 (1950)). Depositions, interrogatories, requests for admissions and discovery of documents have as their objects “the harnessing of the full creative potential of the adversary process, bringing each party to trial as aware of what he must meet as his finances and his lawyer’s energy and intelligence permit.” (Goldstein, *The State & The Accused: Balance Of Advantage In Criminal Procedure*, 69 Yale L.J. 1149, 1180).

The defendant in a federal criminal case cannot request admissions from the Government, and except to perpetuate testimony of a witness who will be unavailable for trial (Fed. R. Crim. P. 15) he cannot take depositions. And when “the case is placed in the grand jury’s hands, it is shrouded with secrecy.” (Goldstein, *The State & The Accused: Balance Of Advantage In Criminal Procedure*, 69 Yale L.J. 1149, 1184). The accused may not inspect any portion of the grand jury minutes unless he shows that a “particularized need exists for the minutes which outweighs the policy of secrecy.” (*Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400; 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1327 (1959)). The Government, on the other hand, has full access to the transcript (Fed. R. Crim. P. 6(e)). Without having to show particularized need, or any need at all, the Government may use the transcript in preparing for trial (*United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S. Ct. 983, 2 L. ed. 2d 1077 (1958) [civil anti-trust suit instituted after

grand jury failed to indict]), and during the trial for many purposes; *e.g.*, to refresh the recollection of witnesses (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233, 60 S. Ct. 811, 84 L. ed. 1129, 1173); to impeach hostile witnesses (*Bosselman v. United States*, 239 Fed. 82, 85 (2d Cir. 1917), *Di Carlo v. United States*, 6 F. 2d 364, 367-368 (2d Cir. 1925)); and in some cases to read into evidence testimony given before the grand jury (*Metzler v. United States*, 64 F. 2d 203, 206 (9th Cir. 1933)).

“In sum, if police or prosecution choose to withhold from the defendant their evidence or legal theories, or if they continue the preliminary hearing until indictment, the defendant has only the notice given him by the indictment, the occasional bill of particulars, and the even more occasional pretrial discovery.” (Goldstein, *The State & The Accused: Balance Of Advantage In Criminal Procedure*, 69 Yale L.J. 1149, 1185.)

Thus the requirement of showing particularized need to obtain production of the grand jury transcript is a burden placed on the defendant alone. The meaning and development of the particularized need rule is seen in three principal United States Supreme Court cases, *United States v. Procter & Gamble Co.*, 356 U.S. 677, 68 S. Ct. 983, 2 L. ed. 2d 1077 (1958); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S. Ct. 1237, 3 L. ed. 2d 1323 (1959), and *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. ed. 2d 973 (1966). The first case, *United States v. Procter & Gamble Co.* (1958), *supra*, was a civil anti-trust suit commenced after a grand jury hearing failed to produce an indictment. The Government was using the



grand jury transcript to prepare its case and the defendants sought the same privilege by moving for pre-trial production of the transcript under Federal Rule of Civil Procedure 34. The Supreme Court held that the "good cause" requirement of Rule 34 may be met only by a showing of "particularized need" and that defendants were not entitled to the transcript because they failed to establish a "compelling necessity" for its production (356 U.S. at 682-683; 2 L. ed. 2d at 1081-1082).

In the second case, *Pittsburgh Plate Glass Co. v. United States* (1959), *supra*, the Supreme Court, in an opinion shared by five of its members, held that the necessity of showing particularized need under Civil Rule 34 also governed the trial court in exercising its discretion under Criminal Rule 6(e). The majority held that neither the rule of *Jencks v. United States*, 353 U.S. 657, 77 S. Ct. 1007, 1 L. ed. 2d 1103 (1958), nor the Jencks Act, 18 U.S.C. §3500, applied to discovery of grand jury minutes. In the *Jencks* case the Supreme Court held that the defendant was entitled to an order directing the Government to produce for inspection all statements and reports of two Government witnesses, relating to the trial testimony of the witnesses. The reports were made by the witnesses to the F.B.I. The Court disapproved the practice of producing Government documents to the trial judge for his determination of relevancy and materiality without hearing the accused. Only after inspection by the accused may the trial judge determine admissibility. And since the accused cannot show that the prior statements conflict with the trial testimony of the witnesses until he sees the statements, the accused may inspect the statements without showing a conflict. "Jus-

tice requires no less." (353 U.S. at 668, 1 L. ed. 2d at 1112). Congress promptly limited the scope of the *Jencks* case by passing the so-called Jencks Act (18 U.S.C. §3500) which provides (1) that the accused is entitled to the statement of a Government witness in the possession of the Government only after the witness has testified, and (2) that the court must inspect the statement *in camera* and excise portions it considers irrelevant if the Government claims that the statement does not relate to the testimony of the witness.

Because the majority in *Pittsburgh Plate Glass Co.*, *supra*, held that disclosure of grand jury minutes is covered by Criminal Rule 6(e) rather than by either the *Jencks* case or the Jencks Act, the accused was held not entitled to automatic disclosure of portions of the transcript relating to the testimony of Government witnesses. Disclosure of grand jury minutes is "committed to the discretion of the trial judge" under Rule 6(e). Secrecy will not be lifted except upon a showing of particularized need (360 U.S. at 399, 3 L. ed. 2d at 1326). The dissent was written by Mr. Justice Brennan, the author of the majority opinion in *Jencks*, and joined by Chief Justice Warren and Justices Black and Douglas. The dissenters thought the *Jencks* case should control disclosure of grand jury minutes. The defendant should be automatically entitled to see portions of the grand jury transcript relating to the direct testimony at the trial of Government witnesses. The defendant should not have to convince the trial court that he has a particularized need for the testimony. The task of the trial judge "should be completed when he has satisfied himself what part of the grand

jury testimony covers the subject matter of the witness' testimony on the trial, and when he has given that part to the defense." (360 U.S. at 410, 3 L. ed. 2d at 1332). The majority's "insistence on secrecy exalts the principle of secrecy for secrecy's sake. . . ." (360 U.S. at 407, 3 L. ed. 2d at 1331).

The third Supreme Court case dealing with the particularized need rule is *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. ed. 2d 973 (1966). There the Court unanimously held that the defendants established a particularized need for disclosure of the grand jury testimony of four trial witnesses by showing:

- (1) The witnesses' memories were fresher when they testified before the grand jury;
- (2) The four witnesses were key witnesses;
- (3) The testimony concerned conversations. When the question is what was said, the defendants should be able to ascertain the precise substance of the statements;
- (4) Two of the witnesses were accomplices of defendants and a third had reasons for hostility toward defendants;
- (5) One witness admitted he was mistaken in earlier statements about dates.

The *Dennis* case represents a liberalization of the particularized need rule based on "the growing realization that disclosure, rather than suppression, of relevant material ordinarily promotes the proper administration of criminal justice." (384 U.S. at 870, 16 L. ed. 2d at 984.) The Court did not decide whether a defendant

has an absolute Constitutional right to pretrial disclosure of grand jury minutes because that issue was not presented. But the case is clear evidence of a growing disenchantment by the Court with a "policy of secrecy" that deprives an accused of evidence essential to adequate trial preparation. The Court took note of the Second Circuit practice of allowing the trial judge to inspect the grand jury transcript *in camera* and to give it to the defendant only if the judge finds inconsistencies between the grand jury and the trial testimony of a government witness (See *United States v. Zborowski*, 271 F. 2d 661, 668 (2d Cir. 1959); *United States v. Spangelet*, 258 F. 2d 338 (2d Cir. 1958)). Without disapproving the Second Circuit practice, the Court held that "it by no means disposes of the matter." (384 U.S. at 874, 16 L. ed. 2d at 986). The defendant and his lawyer are the best judges of material that will benefit the defense. When the defendant shows a particularized need for disclosure the judge must furnish the defendant with pertinent parts of the transcript.

"The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process." (384 U.S. at 875, 16 L. ed. 2d at 986.)

Following the *Dennis* decision, the Second Circuit abolished its *in camera* inspection procedure (*United States v. Youngblood*, 379 F. 2d 365 (2d Cir. 1967)). A defendant who makes a showing of particularized need for grand jury minutes now "is entitled to examine them even if the court's *in camera* examination re-



vealed nothing that could be of any conceivable value to the defense.” (*United States v. Youngblood*, *supra*, 379 F. 2d at 369). Under the new Second Circuit procedure it is no longer indispensable to an order of disclosure that defendant even make a showing of particularized need.

“While *United States v. Procter & Gamble Co.*, . . . and *Pittsburgh Plate Glass Co.*, . . . hold that grand jury testimony need not be provided to the defendant unless he makes a showing of particularized need . . . we do not read these cases to limit the discretion of the trial court to order disclosure to the defendant under Federal Rule of Criminal Procedure 6(e) only when such a showing is made. These cases merely indicate a minimum standard to which the courts must adhere, and *do not limit the court’s power to order disclosure in additional situations where a showing of particularized need has not been made.*” (*United States v. Youngblood*, *supra*, 379 F. 2d at 369. Emphasis added).

Thus in the Second Circuit the trial court may now permit the defendant to inspect grand jury minutes even without a showing of particularized need. The Supreme Court cases dealing with particularized need merely require trial courts to grant disclosure in all cases of particularized need, but do not require the courts to refuse disclosure where there is no particularized need. In *State of Washington v. American Pipe & Construction Co.*, 41 F.R.D. 59, 63-64 (D.C. Wash. 1966) the Court followed *Dennis* and said:

“It is now well settled that disclosure rather than suppression of relevant materials in grand

jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting of relevant testimony therein."

The *Youngblood* and *Washington* cases reflect the growing tendency of state and federal courts, and of legal writers and authorities, to examine critically the particularized need rule and the "policy of secrecy" on which it is founded. If the policy of secrecy was ever justifiable it is not today.

#### Re-examination of the "Policy of Secrecy".

Decisions that require the accused to carry the burden of showing his need for disclosure of grand jury minutes (*e.g. Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S. Ct. 1237, 3 L. ed. 2d 1323 (1959); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. ed. 1129 (1939)), peremptorily exalt the policy of secrecy, which operates only in favor of the prosecution, over other firmly established policies designed to protect the accused. For example, "it is certainly the policy of the law that one accused of crime shall have every opportunity to prove his innocence." (*Atwell v. United States*, 162 Fed. 97, 100 (4th Cir. 1908)). The policy of the law permits disclosure rather than suppression of relevant materials. (*In re Bullock*, 103 F. Supp. 639, 642 (D.D.C. 1952); *State of Washington v. American Pipe & Constr. Co.*, 41 F.R.D. 59, 63-64 (D.C. Wash. 1966)). "It is the policy of the law that truth be ascertained."

(Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 463 (1965)). Federal decisions have recognized exceptions to the policy of secrecy under Rule 6(e). (*E.g.*, *United States v. Rosenberg*, 245 F. 2d 870 (3d Cir. 1957) (impeachment of witnesses); *United States v. Rose*, 215 F. 2d 617, 629-630 (3d Cir. 1954) and *United States v. Remington*, 191 F. 2d 246, 250 (2d Cir. 1951) (defendant allowed to inspect his own grand jury testimony in trial for perjury before the grand jury); *Doe v. Rosenberry*, 152 F. Supp. 403 (S.D. N.Y. 1957) (bar association disciplinary proceedings, a matter of public interest); *United States v. Sugarman*, 139 F. Supp. 878 (D.C.R.I. 1956) (gross irregularities in the grand jury investigation which would vitiate the indictment); *In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952) (dereliction of duty by police officer, a matter of public interest); see 8 Wigmore, *Evidence* §2363 (McNaughton Rev. 1961). But in the vast majority of cases the prosecution has only to invoke the policy of secrecy and the grand jury minutes are automatically immunized from inspection by the accused. Policies favoring the accused vanish in a confrontation with the policy of secrecy brandished by the prosecutor. To require the accused to overcome the policy of secrecy is to approve "an uncritical exaltation of secrecy for secrecy's sake," an "indiscriminate condemnation of disclosure under the shibboleth of 'Secrecy'." (Louisell, *Criminal Discovery: Dilemma Real Or Apparent?* 49 Calif. L. Rev. 46, 69-70). Mr. Justice William J. Brennan recently observed that

"... the implication in the argument against discovery is that the accused is guilty, so that he really has no complaint that his counsel is denied

access to the same materials to aid him better to develop the whole truth. In other words, the prosecution may eat its cake and have it too. To that degree, does not the denial of adequate discovery set aside the presumption of innocence—is not such denial blind to the superlatively important public interest in the acquittal of the innocent?” (*Remarks on Discovery*, 33 F.R.D. 56, 57).

Consistent with “the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of justice” (*Dennis v. United States*, 384 U.S. 855, 870, 86 S. Ct. 1840, 16 L. ed. 2d 973, 984 (1966)), courts, legislatures and legal scholars have closely studied the five traditional reasons (see, *e.g.*, *United States v. Amazon Industrial Chem. Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931)) advanced as justification for grand jury secrecy. These inquiries have produced almost unanimous agreement that the five reasons have no application after the grand jury’s investigation is ended and an indictment is returned. Each reason will be separately considered.

**(1) Does Secrecy Prevent the Escape of a Suspect  
Who May Be Indicted?**

One of the conventional reasons given for maintaining grand jury secrecy is “To prevent the escape of those whose indictment may be contemplated.” (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931); *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954); 9 Wigmore, *Evidence* §2360 (McNaughton rev. 1961); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405,



79 S. Ct. 1237, 3 L. ed. 2d 1323, 1330 (1959) (dissenting opinion of Mr. Justice Brennan)). It is obvious that after indictment and arrest this excuse for secrecy "disappears, in regard to the accused's opportunity to escape, as soon as he either escapes or is arrested, and cannot therefore have any bearing upon later stages of the proceeding." (8 Wigmore, *Evidence* §§2361-2362 (McNaughton rev. 1961). Accord, see Sherry, *Grand Jury Minutes: The Unreasonable Rule Of Secrecy*, 48 Va. L. Rev. 668, 677-78; Seltzer, *Pre-Trial Discovery Of Grand Jury Testimony In Criminal Cases*, 66 Dick. L. Rev. 379, 383-84; Louisell, *Criminal Discovery: Dilemma Real Or Apparent?* 49 Calif. L. Rev. 56, 68-71; *The Impact of Jencks v. United States & Subsequent Legislation On The Secrecy Of Grand Jury Minutes*, 27 Fordham L. Rev. 244, 245).

As with the fear of escape, it will be seen that the other four reasons for the policy of secrecy disappear after indictment.

"But does this policy require secrecy as to the evidence adduced before the grand jury after such jury has made presentment and indictment . . . We think not; because another principle of the law's policy intervenes. It is certainly the policy of the law that one accused of crime have every opportunity to prove his innocence . . . its policy demands that the accused shall have the fairest and fullest opportunity to make clear his innocence." (*Atwell v. United States*, 162 Fed. 97, 100 (4th Cir. 1908)). Accord, see *Metsler v. United States*, 64 F. 2d 203, 206 (9th Cir. 1933); *United States v. Alper*, 156 F. 2d 222, 226 (2d

Cir. 1946); *United States v. Zborowski*, 271 F. 2d 661, 668 (2d Cir. 1959); *Beatrice Foods Co. v. United States*, 312 F. 2d 29, 39 (8th Cir. 1963).

**(2) Does Secrecy Protect the Person Who Is Investigated but Not Indicted?**

The proponents of secrecy advance as their second argument: "To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was no probability of guilt." (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931); *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954).) Appellant has been indicted. Any "protection" that appellant might have derived from the refusal to allow him to see the minutes has long since disappeared. This alleged "protection" obviously has no application to a defendant who has been indicted. (See, *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 406, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1330 (1959) (dissenting opinion of Mr. Justice Brennan); Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 Calif. L. Rev. 56, 68-71; *The Impact Of Jencks v. United States & Subsequent Legislation On The Secrecy Of Grand Jury Minutes*, 27 Fordham L. Rev. 244, 245).

**(3) Does Secrecy Prevent Harassment and Importuning of Grand Jurors and Insure Freedom of Deliberations?**

A third justification offered for maintaining secrecy is: "To insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to

indictment or their friends from importuning the grand jurors.” (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254 (D.C. Md. 1931); *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954)). Appellant did not seek disclosure of grand jury proceedings or evidence before the indictment. He did not ask for names or votes of grand jurors. Votes of grand jurors and other proceedings of the grand jury that do not involve the giving of testimony may be excised from the transcript. (*United States v. Grunewald*, 162 F. Supp. 621, 622 (S.D.N.Y. 1958)). As Mr. Justice Brennan observed in his dissent in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 407, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1331 (1959):

“ . . . the defense seeks nothing which would disclose the votes or opinions of any of the grand jurors involved in these proceedings . . . If there are questions by grand jurors intertwined with Jonas’ testimony disclosure of which would indicate the jurors’ opinions or be embarrassing to them, the names of the grand jurors asking the questions can be excised.”

Appellant had no opportunity to importune grand jurors whose names he did not know. He could not influence their decision to indict him after they had made the decision. And of course there has been no suggestion, and certainly no evidence, that appellant wanted or attempted to influence the grand jurors’ deliberations. This third reason for secrecy

“ . . . does not stand analysis as an argument against discovery, because it is not disclosure of deliberations that is sought but testimony of witnesses, and discovery of course is not possible un-

til after the indictment is rendered when the chance to importune is gone.” (Louisell, *Criminal Discovery: Dilemma Real Or Apparent?* 49 Calif. L. Rev. 56, 70 (1961)).

Thus it is plain that any privilege belonging to the grand jurors is simply a “guarantee that by no legal process will the disclosure of their *votes and their expressions of opinion* in the jury room be compelled.” (8 Wigmore, *Evidence* §2361 (McNaughton rev. 1961). Emphasis in original; *The Impact of Jencks v. United States & Subsequent Legislation On The Secrecy Of Grand Jury Minutes*, 27 Fordham L. Rev. 244, 245). Since appellant does not seek votes or opinions of grand jurors, this third reason cannot reasonably be asserted to prevent disclosure.

**(4) Does Secrecy Prevent Subornation of Perjury or Tampering With Grand Jury Witnesses Who Later Testify at Trial?**

It is next asserted that grand jury secrecy serves “To prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it.” (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254 (D.C. Md. 1931), *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954)). This argument does not withstand analysis. It mechanically raises in importance the so-called policy of secrecy over all the safeguards and policies designed to protect the accused. To the charge that the accused may resort to perjured testimony, “the answer usually given is that the defendant is entitled to the presumption of innocence until the contrary is established.” (Seltzer, *Pre-*



*Trial Discovery Of Grand Jury Testimony In Criminal Cases*, 66 Dick. L. Rev. 379, 383-84.) Indeed, secrecy may accomplish the opposite of the intended result. It may "invite possible perjury. This would be the case were any . . . witness, from that very fact, to be free from any possible later inquiry as to his testimony before the Grand Jury in that regard." (*United States v. Ben Grunstein*, etc., 137 F. Supp. 197, 201 (D.C. N.J. 1955); Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 462 (1965)). "The true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other where both are present.'" (Brennan, *Remarks on Discovery*, 33 F.R.D. 56, 62. See also 8 Wigmore §2362 (McNaughton rev. 1961)).

In *State v. Faux*, 9 Utah 2d 350, 345 P. 2d 186, 187 (1959) the Supreme Court of Utah examined and rejected the five traditional reasons for maintaining secrecy. With regard to the possibility of perjured testimony, the Court said:

"It will be noted that after the indictment is returned and an accused is arrested, the reasons for secrecy have largely been spent. As the writer views it, the furnishing of a defendant with a basis for preparation of perjured testimony has little or no validity. If he will engage in such unlawful machinations, the time element is not going to prevent it and other processes of law must cope with such unlawful conduct." (345 P. 2d at 187.)

Opponents of enlarged discovery are always certain that the reduction of surprise will surely facilitate perjury. But the “underlying predicate [of this argument is] that potential abuse universally condemns a technique—which is the antithesis of the philosophy undergirding civil discovery.” (Louisell, *Criminal Discovery: Dilemma Real Or Apparent?* 49 Calif. L. Rev. 56, 70 (1961)). Of this perjury fear, Mr. Justice Brennan said:

“That old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth is again disinterred from the grave where I had thought it was forever buried under the overwhelming weight of the complete rebuttal supplied by our experience in civil cases where liberal discovery has been allowed. (*State v. Tune*, 13 N.J. 203, 98 A. 2d 881, 884 (1953) (dissenting opinion of Mr. Justice Brennan, then a member of the New Jersey Supreme Court); *Remarks on Discovery*, 33 F.R.D. 56, 62).

Appellant was presumed to be innocent after the indictment was returned. There is no justification for depriving him of this presumption by substituting the presumption that he will obtain perjured testimony to conceal his guilt. Nor is it a sufficient answer to say, after the fact, that appellant has now been convicted and that his innocence is no longer presumed. The government cannot deprive an accused of the opportunity to prove his innocence and then capitalize on the deprivation by showing that because of it the accused was unable to establish his innocence. There is of course no evidence that appellant, a lawyer of high reputation

and standing in the community, attempted to secure perjured testimony. Lacking evidence the prosecution must rest its opposition to disclosure on a presumption that defies experience and logical analysis. The presumption that appellant would suborn perjury of grand jury witnesses at trial if he could review the transcript should not be given credence in this case.

**(5) Does Secrecy Encourage Free Disclosure of Information by Witnesses Who Would Otherwise Not Freely Testify?**

The final argument against disclosure of grand jury minutes is that secrecy is necessary "To encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes." (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931); *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954)). The necessary corollary of this argument is the assumption that witnesses will not freely disclose information if they know that the accused will learn of their grand jury testimony. This reason for secrecy is without support in reason or experience.

The witness who reveals evidence damaging to the accused before the grand jury must expect that such evidence will be disclosed by the prosecution at trial. The giving of testimony tending to prove the accused guilty will be compelled by the prosecution. (8 Wigmore, *Evidence* §2362 (McNaughton rev. 1961)). "No one even contends to the contrary. If the rule were otherwise, this purpose [that the full truth be revealed] would be thwarted and the witnesses might tell irresponsible tales before Grand Juries." (*State v. Faux*,

9 Utah 2d 350, 345 P. 2d 186, 188 (1959)). “Therefore, any hesitancy that a witness might have in divulging harmful evidence before the grand jury would be based upon a fear of the eventual necessity of giving the same evidence *in open court* rather than the fear that, having once given such harmful evidence, his grand jury testimony might be divulged. Disclosure of the prior testimony will not unduly discourage free statements by witnesses before the grand jury.” (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 461 (1965). Emphasis added).

Professor Wigmore places in its proper perspective the question of willingness to testify.

“If the grand jury *indicts* D on W’s testimony, it is plain that secrecy is no longer of any avail, for W will be summoned as a witness at the trial and will be compellable to testify. If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce. If on the other hand his testimony now is inconsistent with that before the grand jury, the privilege ought not to apply. The need for the evidence in the criminal prosecution of defendant exceeds any injury that would inure to the witness-grand jury relation.” (8 Wigmore, *Evidence* §2362 (McNaughton rev. 1961). Emphasis in original. See also *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 407, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1331 (1959) (dissent of Mr. Justice Brennan)).



Appellant did not observe that government witnesses were reluctant to testify in open court. A reading of the transcript in this case and some of the incredible charges made by government witnesses betrays anything but timidity. This final justification for secrecy is, like the other four, based on hypothetical premises that disappear in the face of close scrutiny. Secrecy may actually invite perjury. Secure in the confidence that their testimony will be closeted by secrecy, grand jury witnesses may vent their spleen against an accused by resort to pure fiction and gross exaggeration.

The government has no legitimate interest in maintaining grand jury secrecy after an indictment is returned. If "the fundamental purpose of a criminal trial is not solely to convict the accused" but "to seek the truth and administer justice" (*State v. Faux*, 9 Utah 2d 350, 345 P. 2d 186, 188-189 (1959)), the desire of the prosecution to maintain secrecy so the accused cannot adequately prepare his defense is not legitimate. If "'The United States wins its point whenever justice is done'" (*Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 10 L. ed. 2d 215 (1963)), appellant should have been given the right, exercised by the government, to use the grand jury transcript to prepare for trial. "Certainly without actual evidence and upon conjecture merely, and in the face of the contrary proof of our experience in civil causes, we ought not in criminal cases, where even life itself may be at stake, forswear in the absence of clearly established danger a tool so useful in guarding against the chance that a trial will be a lottery or mere game of wits and the result at the mercy of the mischiefs of surprise." (*State v. Tune*, 13 N.J. 203, 98 A. 2d 881, 884

(1953) (dissent of Mr. Justice Brennan, then a member of the New Jersey Supreme Court); Brennan, *Remarks on Discovery*, 33 F.R.D. 56, 62.)

After analyzing the reasons given for maintaining secrecy, Professor Wigmore concludes that “[t]here remain, . . . on principle, no cases at all in which, *after the grand jury’s functions are ended*, the privilege of witnesses not to have their testimony disclosed should be deemed to continue.” (8 Wigmore, *Evidence* §2362 (McNaughton rev. 1961). Emphasis in original). If it is apparent “on principle” that the traditional reasons for secrecy have no validity after indictment, the lessons to be drawn from actual experience even more dramatically compel Wigmore’s conclusion. Proponents of secrecy argue that the necessity for secrecy is dictated by experience. But to what experience can they point to support this conclusion? The answer is that they have had no such experience. In fact, the information gleaned from actual experience demonstrates the speciousness of the arguments against disclosure.

### **The English Experience.**

As seen above, England abolished grand jury secrecy when it was no longer necessary to protect jurors from intimidation by the Crown. In 1848 the Indictable Offenses Act (11 & 12 Vict. c. 42 §§1, 27) provided for commitment by a preliminary examination procedure as an alternative to grand jury presentment. At the preliminary examination the accused obtained full pre-trial discovery of the prosecution’s case (Seltzer, *Pre-Trial Discovery Of Grand Jury Testimony In Criminal Cases*, 66 Dick. L. Rev. 379 (1961-1962)). By 1933 the preliminary hearing pro-

cedure was used almost exclusively and the grand jury was abolished (The Administration Of Justice (Misc. Provisions) Act, 23 & 24 Geo. 5, c. 36 §1 (1933); *United States v. Worcester*, 190 F. Supp. 548, 559 (D.C. Mass. 1960)).

What has been the result on English criminal justice of grand jury abolition? One observer noted that in England today "nobody mentions it, nobody regrets it, nobody is any the worse off." (Elliff, *Notes On The Abolition Of The English Grand Jury*, 29 Amer. Journal of Crim. Law & Crimonology 3 (1938-1939)). Of the continued use of the grand jury in the United States, an English commentator said, "'We took a long time to perform the necessary operation ourselves, so we must not be critical of other communities for delay, though it is an odd fact that more antiquated English legal procedure survives in America than here.'" (*Id.* at 22). Appellant is of course not suggesting that the grand jury system, provided for in the Fifth Amendment, be abolished in this country. But in deciding whether the traditional reasons given for maintaining secrecy after indictment have validity we should not blind ourselves to the experience of jurisdictions that have done away with secrecy. In England, where for over 100 years the accused has enjoyed full discovery rights, the fears of those who oppose the end of secrecy have been exposed as unrealistic. "[I]n England no prospective witnesses or others have raised objections to disclosure at the magistrates' preliminary stage of evidence that may or may not be offered at the trial itself." (*United States v. Worcester*, 190 F. Supp. 548, 559 (D.C. Mass. 1960)).

It has been argued that the English analogy is not relevant to problems of criminal justice in the United States. Mr. Justice William J. Brennan answers that argument as follows:

“The . . . argument is that the experience of other nations where broad discovery has not subverted the criminal law, notably, England and Canada, does not help us here in America. I can’t as readily . . . disregard the absence of the conjured dangers in England and Canada under a form of discovery, as I have said, advantaging the accused far beyond anything presently in or proposed for our system. First of all, the argument that crime is increasing at a greater rate in America than in those countries would, I think, come as a surprise to their law enforcement officers. But if it is true that we are a less law-abiding people than the British, how explain the satisfaction with broad criminal discovery of our neighbor Canada between whose mores and our own similarities are so often remarked?” (*Remarks on Discovery*, 33 F.R.D. 56, 64-65).

We adopted from England the rule of secrecy when we did not have England’s reason for secrecy. Since we so faithfully followed the example of England in adopting grand jury secrecy we should not shut our eyes to England’s reasons for abolishing it.

#### **The Federal Experience.**

Federal civil procedure permits broad pre-trial discovery. (Fed. R. Civ. P. 26-37; 4 Moore, *Federal Practice* §§26.02-.03 (1950).) The fallacy of the arguments against grand jury disclosure “has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been al-



lowed. . . . Indeed, that experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication.” (Brennan, *Remarks On Discovery*, 33 F.R.D. 56, 62). Thus the arguments against grand jury secrecy cannot rest on unfavorable experience with civil discovery. And they certainly cannot be based on experience with disclosure of grand jury minutes in federal criminal cases. There has never been any such experience.

“[H]ow can we be so positive criminal discovery will produce perjured defenses when we have in this country virtually shut the door to all such discovery? That alleged experience . . . is simply non-existent. So if it be true, as unfortunately it is, that crime is on the rise in America, we surely can’t blame that regrettable fact on the operation of criminal discovery procedures.” (Ibid).

It is therefore plain that arguments against grand jury disclosure cannot be sustained by reference to experience with discovery in federal courts. On the contrary, the excellent results obtained from civil discovery make a convincing case for disclosure.

#### **The States’ Experience.**

Recent state decisions mark an unmistakable trend in the direction of liberal pre-trial inspection of grand jury minutes in the discretion of the trial court. (*E.g.*, *State v. Faux*, 9 Utah 2d 350, 345 P. 2d 186 (1959) [defendant permitted to examine grand jury testimony before trial so he could determine at trial whether there was any inconsistency in the testimony]; *State ex rel. Clagett v. James*, 327 S.W. 2d 278 (Mo. 1959) [de-

fendant allowed pre-trial inspection of grand jury testimony of witnesses who would testify at trial]; *State v. Moffa*, 36 N.J. 219, 176 A. 2d 1 (1961) [defendant permitted pre-trial inspection of grand jury testimony to prepare his defense]). In *State v. Faux*, *supra*, defendant was indicted by the grand jury for misconduct in office. A Utah statute provided, in language similar to that in Criminal Rule 6(e), that the transcript could be exhibited to no one other than the County Clerk and the District Attorney "except upon written order of the court duly made after hearing. . . ." (Utah Code Ann. §77-19-9 (1953)). In a well reasoned opinion the Utah Supreme Court held that the trial court did not abuse its discretion by permitting defendant's counsel to examine the transcript before trial. Thus the court did not have to decide whether defendant was entitled to pretrial inspection as a matter of right. But the opinion indicates that if the question had been presented the court would have held that after indictment the defendant has an absolute right to the transcript. After reviewing the five traditional reasons for maintaining secrecy, the court said, "It will be noted that after the indictment is returned and an accused is arrested, the reasons for secrecy have largely been spent." (345 P. 2d at 187.) The court recognized that deliberations of the grand jury may be protected by secrecy, but,

"While secrecy may be justified at certain stages of the proceedings for the purposes hereinabove indicated, all fair-minded persons will concede that ultimately the full truth should be revealed to the court and jury. In such instance the truism should be recognized that the truth should have nothing to fear from light." (345 P. 2d at 188-89.)

The court then pointed out that in a preliminary hearing procedure, unlike a grand jury investigation, the accused is afforded an opportunity to adequately prepare for trial because he knows what the witness against him testified to. The court concluded:

“Our law has come a long way since the days of the English Star Chamber when men were tried without being present and condemned on testimony of witnesses whom they were never permitted to see. If anyone is under the illusion that in this country one may be condemned for alleged crime upon evidence taken in his absence and kept secret from him, it is heartening to be able to point out that such is not the state of our law. Fortunately such proceedings are not now regarded as among the brightest chapters in the development of our system of justice.” (345 P. 2d at 189).

Many states only occasionally employ the grand jury to initiate criminal prosecutions. Long and satisfactory experience by states that use the preliminary hearing procedure completely refutes the arguments of those who insist that secrecy is necessary to “protect the accused,” or to “protect witnesses from the accused.” According to a 1931 survey, nineteen states permitted felony prosecutions to be initiated by information or indictment. In the majority of these states most prosecutions were initiated by information. (Morse, *Survey of the Grand Jury System*, 10 Ore. L. Rev. 101, 121-23 (1931)). In Kansas and Wyoming, for example, the grand jury is seldom used. In Kansas it is used only by a petition signed by taxpayers and addressed by the court (Kan. Gen. Stat. Ann. §62.901 (1949)).

In Wyoming it is used only upon order of a district court (Wyo. Stat. Ann. §7-92 (1957)). See Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 469 n. 51 (1965)). Four states have provided by statute that, after an indictment is returned, the defendant must be furnished with a copy of the grand jury minutes in advance of trial (See Cal. Pen. Code §938.1; Iowa Code §772.4 (1962); Ky. Crim. Code §110 (Baldwin 1953); Minn. Stat. Ann. §628.04 (1947)). In California the great majority of prosecutions are started by filing an information. However, when the grand jury is used the defendant must be provided with a copy of the transcript of testimony before trial. This procedure has been mandatory since 1927 (Cal. Stat. 1927, ch. 684, §2, amending Cal. Pen. Code §925 (now §938.1), see Cal. Stat. 1959, ch. 501, §2, as amended Cal. Stat. 1963, ch. 687 §1). There is no evidence that giving a defendant the absolute right to the grand jury transcript before trial has had an adverse effect on the fair and free presentation of evidence. On the contrary, the grand jury has remained a vital and effective instrument of the California judicial system (Kennedy, *Historical & Legal Aspects Of The California Grand Jury System*, 43 Calif. L. Rev. 251, 267 (1955)).

Secrecy need not be entirely abolished to assure the defendant a fair trial by allowing him to adequately prepare his defense. In California ordinary sessions of the grand jury are conducted in private. Unauthorized persons are not permitted to be present (Cal. Pen. Code §939 (1967 supp.)). Deliberations and voting are done privately. A transcript of the testimony received is made only if an indictment is returned (Cal. Pen. Code §938.1 (1967 supp.)). Thus the privacy of the person



who is not indicted is protected. If a defendant who has been indicted is not in custody, neither the fact of the indictment nor the contents of the transcript may be disclosed (Cal. Pen. Code §§924, 938.1 (1967 supp.)). Thus, secrecy is insured when secrecy is necessary. When the reasons for secrecy disappear, disclosure is permitted.

### Conclusion.

The inescapable conclusion to be drawn from this review of the experience of jurisdictions that permit disclosure of grand jury minutes is that the reasons advanced for maintaining secrecy are based on false premises. It will not be denied that an accused can better prepare for trial if he can use the grand jury transcript. His trial is unfair if he is unable to adequately prepare for it. It is unfair to allow the prosecution to use the transcript and to deny that privilege to the accused. A defendant who does not receive a fair trial is denied due process of law (*Moore v. Dempsey*, 261 U.S. 86, 43 S. Ct. 265, 67 L. ed. 543 (1923); *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937)). Appellant was deprived of a vital source of evidence and information essential to his defense. Due process is violated when the accused is deprived of evidence favorable to his defense (*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. ed. 2d 215 (1963)).

“The Constitution does not discriminate between evidence obtained by the state from an extrajudicial statement of a witness and testimony given by that same witness before a grand jury. The life or liberty of an accused is no less important when the source of the favorable evidence is a

grand jury hearing. Therefore, a statute that would stand as an obstruction to such disclosure . . . . must fall before the Constitutional requirements of due process.” (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 489 (1965)).

To the extent that Criminal Rule 6(e) permitted the trial court to refuse appellant’s request for permission to examine the grand jury minutes before trial, that statute, and the court’s refusal, violated appellant’s right to a fair trial under the Due Process Clause of the Fifth Amendment to the Constitution. A federal constitutional error compels reversal on appeal unless the government can prove that it was harmless beyond a reasonable doubt (*Chapman v. California*, .... U.S. ...., .... S. Ct. ...., 17 L. ed. 2d 705, 710-711 (1967)). Without the grand jury transcript appellant was unable adequately to prepare to defend against the testimony of dozens of witnesses given in a trial that lasted three months and filled over 15,000 pages of trial transcript. The constitutional error committed by depriving appellant of the opportunity to adequately prepare his defense was not harmless. The judgment of conviction should be reversed.

BALL, HUNT, HART & BROWN,  
CLARENCE S. HUNT,  
FREDERIC G. MARKS,  
JOSEPH D. MULLENDER,  
ANTHONY MURRAY,

*Attorneys for Appellant.*

### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARENCE S. HUNT





## **APPENDIX A.**

**Complaints Reviewed by Attorney Finell.**



Santa Monica, Calif.  
Jan 14 61.

ocel  
Pr.  
eanch Dev.Co.,  
lyHills Cal.

31;  
With reference to Contract#IIIO Ranch # F.33\*13 Jan 4 61  
is Arthur and not Alfred)let me say this.  
My wife and I visited the ranch in June of 61and needless  
we were greatly dissapointed. We were led to believe from  
the pictures that is was a green lush area and we found  
mostly dry sage brush rocky road desolate looking prairie  
We also found that water is not too plentifuland that  
for same might be a rather expensive operation at best.  
that the variation in temperatures was much greater than  
told.  
In view of all the above if the land is as good as you claim  
then there should be no difficulty for you to re sellit  
it is not as good as you claimthen we should have our money  
back to us in full.

Very Truly Yours

*Arthur Alfson*  
Arthur Alfson  
951 2th St.,

Santa Monica  
California.







JAN 15 1962

W. S. Besner  
14818 Fonthill  
Hawthorne, Calif.

January 11, 1962

Amle Ranch Development Corp.  
11 Wilshire Boulevard  
Beverly Hills, Calif.

Dear Sirs:

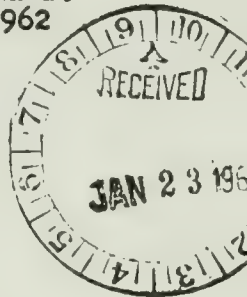
I recently read an article in the newspaper that said  
you firm would refund all money paid on land bought at  
Amle Ranch if the buyer was dissatisfied. We are among the  
dissatisfied buyers. We feel that pictures we were shown  
 misrepresented the land we bought. My wife and I drove to  
Amle Ranch this summer to see our land and were very dis-  
appointed. It was nothing like we had been led to believe.  
It is true that you are refunding all money paid by dis-  
satisfied buyers, we would appreciate it if you would refund  
our, providing the refund includes all interest paid.  
Thank you

Respectfully Yours,  
W. S. Besner

Contract No. G-964



2727  
1106 N. Concord St.  
Santa Ana, Calif.  
January 19, 1962



Ranch Development Corp.  
Mr. G. L. Weller  
Wolshire Blvd.  
Hills, Calif.

een,  
Whereby we give notice of rescission of our contracts  
2727 and 2728 dated October 25, 1961 for the purchase  
of estate parcels K-1-45 and K-1-44 respectively in Section  
Gamble Ranch, Elko County, Nevada.

The initiation of this rescission is specifically based upon  
through conviction that the present status and immediate  
development and industrialization of the town and surrounding  
of Montello, Nevada have been grossly and fraudulently  
presented by the seller.

We were briefly shown copies of the Declaration of Restrictions  
in State of California Subdivision Public Report regarding this  
and, after our signing of the contracts to purchase, both  
together with our payment record receipt book were retained  
by the seller without our knowledge and against our will.

We were specifically made to feel by the seller that we could  
"reap a big harvest" on our investment in a short time.

Again specifically, the seller claimed as evidence of the  
active heavy industrialization of the area, the location there  
of a large distribution center by Sears Roebuck & Co. To our  
knowledge this claim has no basis in fact.

Need we are thoroughly convinced that any development of  
our investment -wise either at present or in the foreseeable  
future will be only to the extent artificially and superficially  
presented by the seller.

We therefore rescind these contracts to purchase and demand  
refund of all moneys applied thereto.

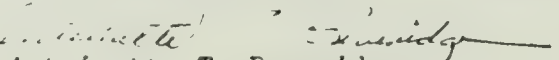
All pertinent documents concerning this purchase will be  
returned upon your acknowledgement of this rescission and our  
payment of money due.

Yours Truly,

Atty. General,  
State of Calif.

Assemblyman  
Lester McMillan

  
Warren R. Beveridge

  
Antoinette T. Beveridge





Jan. 17, '12

To Whom it may concern.

I am a properly owner of  
the. I am not pleased with  
it I have purchased. I think  
was created. I would like  
it my cash back, that  
property is no good.

Jack K. Spill





Edward K. Ingraham  
3909 West 148th St.  
Hawthorne , Calif.

Jan. 18th. 1962

Robert McDonald, Atty.  
Westates Land Development Corp.  
Ranch Dev. Co.  
Wilshire Blvd.  
Beverly Hills , Calif.

Dear Sir;

I read an article in the paper, in regard to your meeting with the State Realty Commission. In this article you stated, that the money paid toward the purchase would be returned, if the person felt they were dealt with unfairly, and my wife both fall in that category. As for the "Movies", and last July we took a trip to see the, "Land". Needless to say, that after seeing it we felt worse. "No trees, just no nothing, but there was, "land", and the man showed us that he thought was our 10 acres, but he couldn't be sure. Montello, is not a thriving town, and if you want my opinion, anyone concerned, would be better off if it was, "burned down, and then".

The only good thing I can say, is , the "Food was good, and the service was nice, and the accomadation's at the "Motel", were comfortable. The road was being worked on, and was in very bad condition, and we got stuck, and the man running the grader pushed us out, but banged up the back of our car. We were so glad to get away from there that we didn't have any complaining, but just keep on going, with a grateful wave of thanks, for his effort.

My book says we have paid \$440.00 on contract G-884 Ranch No.

I'll look for your check.

Thanks for your consideration,

I remain ,

Yours Sincerely;

Edward K. Ingraham

*Edward K. Ingraham*







Jamble Ranch (Associated),  
Tonight as my husband &  
were watching the news on  
television, we were shocked at  
the words that came over the  
waves. Jamble Ranch is a  
scam! We immediately called  
an attorney and he advised  
us to write and demand our  
full reimbursements of payments  
and interest immediately or  
there will definitely be a  
court order against you and we  
will not stop until we get our  
full amount, which according  
our records is \$355<sup>50</sup>.

# H-11-32  
# 1916

Respectfully,  
Mrs Mrs Henry Kling





PRAY  
FOR  
PEACE



Amble Ranch  
9412 Wilshire Blvd.  
Beverly Hills, Calif





January 12, 1962

Thumble Ranch Development Corp.

S.D.

Dear Sirs:

We visited the Thumble Ranch last  
year and were very disappointed in  
what we found. It seems that others  
were also disappointed in the  
property. We too had been told that  
a casino would be established nearby  
and a planned city would be built.

A number of newspaper clippings  
were sent to me by my brother in  
Nevada with his estimate of the true  
value of the land. Enclosed is a  
clipping from the San Diego Tribune  
from January 12, 1962 edition. It  
states that Robert McDonald, attorney for  
Pacific Westgate Land Development Co.  
told the Nevada Real Estate Commission  
the corporation would refund money  
to dissatisfied buyers. The Nevada Paper  
has the new name as Pacific Westgate and  
Pacific Western State. It seems the firm  
name was changed about two months ago.

We have been sending our payments  
to Thumble Ranch Development Corp. and



The name has not been  
changed on the last return envelope  
sent to us.

The establishment of several  
important industries in the area  
seems to be far pitched after looking  
at the land.

We would like to have our  
money refunded that was paid on  
the following piece of land.

tract # 1256

tract # C-7-62

oil payments of \$415.00

Feb. 8-61 - 90

Feb. 28-61 - 25

Mar. 30-61 - 25

May 3-61 - 25

May 26-61 - 25

June 20-61 - 25

June 18-61 - 25

July 31-61 - 25

Sept. 5-61 - 25

Oct. 27-61 - 25

Nov. 24-61 - 25

Dec. 2-61 - 25

Dec. 29-61 - 25

Dec. 27-61 - 25

Will you please let us know as soon as possible  
if the refund on this piece of land.

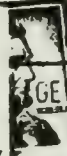
Very truly  
Hugh E. Leonard  
Elvis E. Leonard. RI 4-Bx 3220  
Visita Calif

EXHIBIT 3-362





14 Jan. 1962



Westgate Land Development  
Wilshire Blvd.

Hills, Calif.

Subject: Gamble Ranch

We respectfully demand a  
refund on Contract No.  
for the sum of \$315.00.

As the land was misrepresented  
as fertile, rich land  
with trees and a never  
ending supply of water.

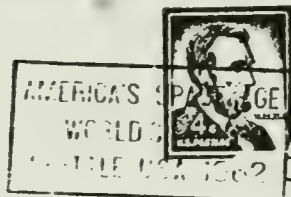
Your check by return  
will be very much  
appreciated.

Very sincerely,  
Mrs. Eleanor Patterson

1137 Osage  
Chula Vista, Calif.



17 Osage  
La Vista, Calif



See Westgate Land Dev Co  
9412 Wilshire Blvd.  
Beverly Hills, Calif





Jan. 12, 1962

Mr Sir:

Upon information received from the Nevada Real Estate Commissioner, we understand that our money will be refunded for the purchase of Ranch E-21-7, contract no. G-682.

I, James R. Rossi and Clarence C. Smith, both had been misled by Jack Savage, of San Jose sales representative of Gamble Ranch. He showed us green pastures with abundance of cattle roaming and lots of water. Upon investigation we found that what we had purchased was nothing like what was told to us and what was shown to us.

Hoping to hear from you soon

I remain

Yours truly,

*James Rossi*

*Clarence C. Smith*

*James Rossi  
859 So. Monroe St.  
San Jose, Calif.*

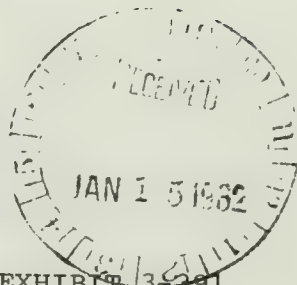


EXHIBIT 3-391

Page A-12



Noyes Kouri  
1877 So. Monroe St  
San Jose, Calif.

Samuel Ranch Development Corp  
9412 Melrose Blvd.  
Beverly Hills, Calif.

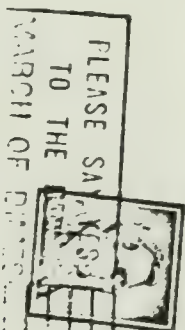


EXHIBIT 3-391

Page A-13



Jan. 15, 1962  
San Diego, Calif.



Public Westgate Land Development Corp.  
12 Wilshire Blvd.  
Beverly Hills, Calif.

Attention: Mr. Robert McDonald

Mr. McDonald,

After reading the article in the San Diego  
Herald-Examiner Newspaper, concerning the misrepresented  
land on the Gamble Ranch, I believe I fall in  
line.

I feel misled, as at the time of purchase we  
were shown pictures and pamphlets of lush  
land. As I understand, it is mostly sage-  
brush with no water. This property is to far  
from the conveniences I was led to believe  
it was.

I would like my money back as I am very dis-  
satisfied.

My ranch number is D 13-118, and my contract  
number is 244.

I expect to hear from you soon.

Sincerely,  
*Richard E. Senn Jr.*  
Richard E. Senn Jr.  
5163 Aberdeen St.  
San Diego, Calif.

has





Richard E. Senn Jr.  
5163 Aberdeen St.  
San Diego 17, Calif.

Pacific Westgate Land Development Corp.

9412 Wilshire Blvd.

Beverly Hills, California

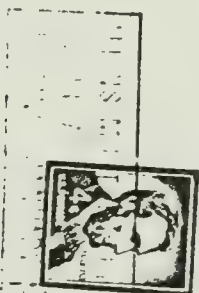


EXHIBIT 3-393

Page A-15

ATTENTION: Mr. Robert McDonald



8934 Eldorado Parkway  
El Cajon, California  
January 14, 1962

Sir;

understand that anyone who feels the property at Gamble Ranch was unfairly represented and is unable to get his money returned. I definitely feel that the property was misrepresented. It was presented as being right at the edge near to the pictures shown of deep grass and plenty of water. I was told by the salesman that the water table was only 12 feet deep and now I hear from other salesmen that it is from 200 to 300 feet deep. I saw the property this summer and were disappointed to see that it is desert, no water and no trees. Please reply as soon as possible.

Yours truly,

RE - E-27-12

PC - 1087

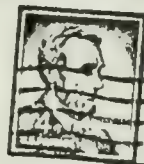
*Wm D. Miller L R Snyder*





AFTER FIVE DAYS RETURN TO

FR Jimmy  
345 Wilshire Parkway  
Los Angeles Calif.



James E. Ranch Development Corp.,  
9412 Wilshire Boulevard,  
Beverly Hills,  
California.



January 15 1962

Cable Ranch Development Corp.  
42 Wilshire Blvd.  
Beverly Hills, Calif.

Gentlemen:

According to newspaper articles, Mr. Robert McDonald,  
attorney for Pacific Westgate Land Development Corp.  
stated "Californians who think they were bilked in buying  
Cable Ranch land in Nevada sight unseen can have their  
money back.....the money, regardless of the amount, ~~xxxxxx~~  
~~xxxxxx~~ that they have paid, will be refunded in  
full immediately."

I feel that the property has been grossly misrepresented.  
Friends of mine who have visited it have told me that it is  
not as represented by your literature or salesman.

I am enclosing my contract payment book 1868, showing that  
I have paid \$345.50 ; also contract book 1869 showing  
payment of \$260.00  
\$605.50 total. I hereby request the return of  
my payments in full.

I have not yet written to the Nevada Real Estate  
Commission about this, and shall await your reply before  
proceeding.

Sincerely yours,

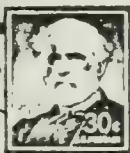
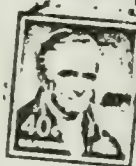
*R. M. Stockton*

Robert M. Stockton  
1020 So. Ditmar St.  
Oceanside, Calif.





M. Stockton  
So. Ditmer St.  
anside, Calif.



REGISTERED  
RETURN RECEIPT REQUESTED

GAMBLE RANCH Development Corporation

9412 WILSHIRE BOULEVARD  
BEVERLY HILLS  
CALIFORNIA





Mrs Eklamay Suehnholz  
4807-E-Florence Ave,  
Bell, Calif.,.

January 9th, 1961

Refer to; Parcel, N.W. $\frac{1}{4}$  - S.E. $\frac{1}{4}$  - S.W. $\frac{1}{4}$   
of section 33 Township 39n  
Range 69E. In Gambele  
Ranch, Nevada.

Dolores A. Hoffman  
Authorized Agent

F.L. Gillhouse  
Salesman.

Dear Madam;

On or about November 2nd 1960 I called your Office by the prescribed Telephone number given on the Television Advertisement. Then on November the fourth your Salesman namely, F.L. Gillhouse called at my home, at the above mentioned address. He showed my husband and three other guests at my home, some Colored slides, and a recorded voice on same, also he showed them several picture advertisements and made several statements regarding this project and he made statements before my husband and the witnesses as follows. That the water was shallow at fifty to one hundred feet, all excess roads to the property were being developed therein without cost to us, the plots were all marked and surveyed, That a large new Gambling casino was planned for the near future, And he showed a letter with the Governors signature thereon, stating that the land was lush grass land, showing pictures of cows grazing thereon, also that there would be electricity available, and that natural Gas was bordering the property. Now during the conversation with Mr Gillhouse, my husband said that he would first like to visit the site, and make sure of satisfaction, but he then stated, that he had a special piece of property that was bordering on a main road leading out of the new site of the township, and he added he would make a special bargain on this parcel if I would act right away, and he went to phone to make sure that the parcel was still available, since we were in the Beauty Parlor business and met so many people he wanted us to have this special parcel.

So after he finished his phone conversation, and stated that the parcel was available, he signed the contract paying \$125.00 down with payments to start Dec, 16th, 1960 at the rate of \$31.50 plus interest, I made 12 monthly payments and then on April 5th, 1961 I paid the balance of \$2,205.48 paying the property off in full.

Then in June 1961 I took a vacation for the purpose of checking over the property, I had a twenty two foot trailer hauled up there we arrived at the Headquarters all four of us. Then I was introduced to Davidson, who was your representative on the project. I had one man with the man that hauled the trailer up there and they arrived at there the day before us, and he was abuilding contract and trailer with letting out land, and he helped Mr Davidson to lay two of the corner pieces in, I then asked Mr Davidson questions, I said how would I get into the property? he said you would have to cut your own road into the property, I also found out that the property was misrepresented to me, and was not the plot on the main road leading out from the proposed townsite, Then Mr Davidson stated that I would be lucky to reach water in less than three hundred and fifty feet, the land was not as the sales man described, it was covered with sage brush, he also stated,

continued next page.



continued from page one.

In order to drill a well for water it would cost me from \$3000.00 to \$5000.00 and this would not include the motor as the Electricity was not available. Then there was the additional cost of clearing the land with the same brush. He also stated that he did not know of any new site being built near on the project. From this information I returned from Mr Davidson, and finding all the misrepresentations made by the Salesman Mr. F.L. Gillhouse, I became very much upset and I phoned home to him, he then became very evasive, and stepped into his Station Wagon and rode off. We were left standing there all by ourselves, he returned shortly, and I asked him would he be kind enough to show me a place where I could leave my House Trailer, and he would be kind enough to sell same for me for I did not want the hassle of hauling same back to Bell, California, and that I would be willing to pay him ten percent for the sale price, he said that he would lead to, and then we left for home. Then we did not receive any word from him for one month and I sent a man out there to haul my trailer back to Bell, Calif., when I arrive there with the hauling I found my trailer inside was wrecked, it cost me \$100.00 for repairs and replacement thereto.

I want to say here, that after I returned, I called your Office and Mr. F.L. Gillhouse to come to my house as I wished to see him. He told me he would be here in a few days, that was about six weeks ago, and he has not shown here yet, this I also call bad faith. In lieu of all the misrepresentations he made on this property, due to the statement in the Los Angeles Times and also our local paper, "The Huntington Park Signal, I am hereby requesting the refund of the full purchase price in good faith. If you will take care of this matter promptly, with the heads of the Land Development Organization, in accordance with the Statements of the Attorneys for the Organization, of which I am keeping copies of one, with the names of same therein, and I assure you I will not bring this over no six months, I will then go further with the matter.

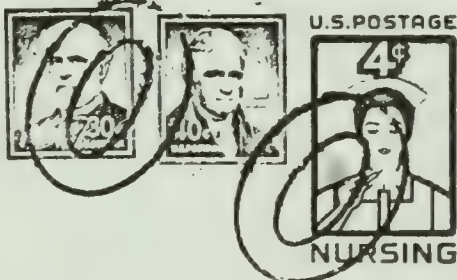
Very truly yours

*Ellamay Suehnholz*





2 S 6 1012  
7-1-1961  
11 10118  
11 10118

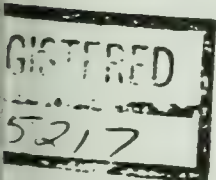


GAMBLE RANCH Development Corp.

9412 WILSHIRE BOULEVARD

BEVERLY HILLS

CALIFORNIA





## **APPENDIX B.**

**Complaints Reviewed by Attorney Ross.**



2470 Elcom Ave,  
Costa Mesa, Calif.  
Aug. 6, 1962

Gamble Ranch  
41 Wilshire Blvd.  
Berly Hills, Calif.

RE: A.W. Ayers  
Ranch D-3-5  
Contract 1411

Mr. John Curly:

Sir,

On the 19th. day of February, 1961, fraudulent, false  
and untrue statements were made to induce me to purchase a parcel  
of Gamble Ranch, known as D-3-5, under contract #1411. Through  
neglect, your advertizing, and publication of "Gamble Ranch  
Sale", I was made to believe this was good ranch and home  
land. ~~On my inspection~~ Upon inspection I find it arid and barren wasteland.  
Therefore demand refund of four thousand seven hundred ninety  
dollars and ten cents. ( \$4,792.10 ).

Refund	\$4,990.00
Amount paid	112.56

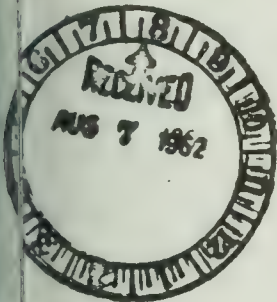
Amount on payoff	\$ 5,102.56
	310.46

Total	\$ 4,792.10
-------	-------------

On advice of counsel, I give you this opportunity  
for restitution. An immediate reply is expected, or legal  
action will be taken.

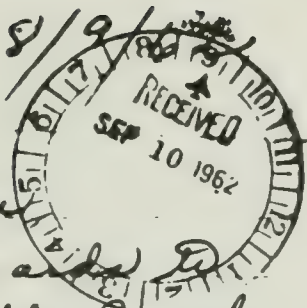
Respectfully

*A.W. Ayers*  
A.W. Ayers









Dear Mrs. Jourd'au

In regards to

the land at Humble Ranch  
we are sorry to tell you  
how bitterly disappointed  
we were. When we took  
time & money to drive up  
to see it we saw how mis-  
represented it was to us.

First of all it was at the  
base of a mountain, no roads  
& completely inaccessible.

We are too advanced in  
years to wait for any dev-  
elopment that could pos-  
sibly help us in any way.  
Had we known we would  
certainly never invested  
in anything of that kind.



It also took our meager  
savings to buy into it -

We hope you will be  
able to refund our money.  
I am sorry the land was  
advertised in such a  
misleading way.

Hoping to hear from  
you as soon as possible

Respectfully,

Sam & Mrs. J. J. Morgan.  
6631 Salt Lake Ave.  
West, Calif. #66

Contract # 3204

Ranch # D-13-59





August 2, 1962  
1140 Dewey Avenue  
Los Angeles 6, Calif.

Gamble Ranch Development Corp.  
9412 Wilshire Blvd.  
Beverly Hills, California

Dear Sirs:

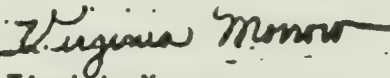
Enclosed is my payment book and check for \$15.00.

~~Since your company can no longer sell Gamble Ranch parcels~~  
in California due to misrepresentation in advertising, I  
would like a letter from you stating your plans for the  
California buyers who have contracts with you.

It is one thing to buy land from a California corporation  
who has expansion plans for Nevada land for California  
buyers, and quite another when the corporation is prevented  
from further selling in California.

I will appreciate an immediate explanation from you.

Very truly yours,

  
Virginia Morrow

cc: Harold L. Myers, Atty.  
215 W. 5th Street  
Los Angeles, California



C. L. Newton  
501 West Lathan  
Hemet, Calif.

Ranch Development Corp.

Highway Blvd  
Hemet, Calif.

Dear Sirs;

I have been paying on 10 acres of land purchased from  
After seeing the land I feel you have greatly overstated its  
land advantages. Water is unavailable, also power. Both would  
be considerable to acquire. The land looks like it wouldn't grow

At the least I am dissatisfied with the purchase and feel  
money should be refunded.

As I have paid \$415.00 into the land, including interest

I await your immediate answer. I am inclosing a self addressed  
envelope for your convenience.

Sincerely.

C. L. Newton

Contract #2549

Ranch K-1-16





GORDON & WEINBERG

PA. GORDON  
ONAD D. WEINBERG  
EOPF A. COULTER  
ERAD N. GORDON  
ARCE E. SHELTON

2323 WEST THIRD STREET  
LOS ANGELES 57, CALIFORNIA  
DUNHILL 9-2323

November 19, 1962

NOV 20 1962

mb: Ranch Investments  
5 Brighton Way  
very Hills, California

Re: Mr. & Mrs. Harry Novick  
Contract G461  
Branch No. D-3-12

Attention:

is to advise you that we have now been consulted by Mr. and  
s. Harry Novick regarding their purchase of a forty acre section  
he Gamble Ranch, on June 25, 1960. After reviewing this matter  
oroughly, with both the State Real Estate Commission and certain  
ltes in and around Elko, Nevada, we have been instructed by Mr.  
Ms. Novick to advise you that they hereby elect to rescind the  
ecent made by your company, as seller, and the Novicks as  
er in writing, dated June 25, 1960, on the ground of fraud, con-  
in of your company's representation regarding the condition of  
sal property.

statements, both written and oral, the Novicks were led to believe  
there was an adequate water supply available, whereas water was  
to be 200 feet down in some spots; that there were access roads  
er completed or about to be completed, when in fact, no such roads  
to their property; that there was electricity available, when in  
fact, such power existed; and that the said land was capable of grow-  
crops such as alfalfa, pasture, small grains, corn, deciduous  
trees and potatoes when, in fact, the soil is unable to support the  
weight of these crops.

undersigned is hereby empowered by Mr. and Mrs. Novick to  
return to you all things of value relating to this transaction  
your restoration to the Novicks of their total purchase price to  
be the sum of Seventeen Hundrend Seventy-five Dollars (\$1775)  
once paid to you.

Re: November 19, 1962

GORDON & WEINBERG

By

Aaron E. Sheldon  
Attorneys for Mr. &

Mr. & Mrs. Novick

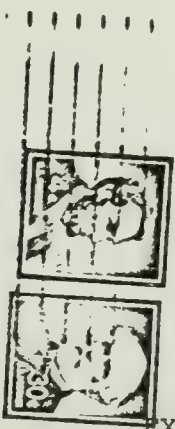
EXHIBIT  
Page B-





*Law Offices of*

GORDON & WEINBERG  
2323 WEST THIRD STREET  
LOS ANGELES 57, CALIFORNIA



RETURN  
RECEIPT REQUESTED

**CERTIFIED**  
No. 623631

Gamble Ranch Investments  
9615 Brighton Way  
Beverly Hills, California



# LIVE-WIRE LINDSKOG, INC.

REAL ESTATE AND INSURANCE

Post Office Box 1349

910 IRWIN STREET

Telephone Glendale 4-0832

SAN RAFAEL, CALIFORNIA

Sept. 17 1962

P. O. Box 296

188 E. Blithedale Ave.

MILL VALLEY - Dunlap 8-7331

Pacific Weststates Land Dev. Corp.  
9615 Brighton Way  
Beverly Hill, Calif.

#1525

Dear Sirs:

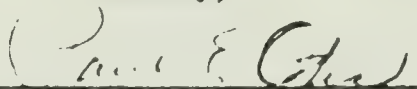
Nearly two months ago I wrote you regarding my C-5 property and todate I have received no answer.

To review my case, after I purchased this property, I went to the ranch to see this 0 acres. I was disappointed and feel there has been misrepresentation by the salesman and our literature. For example claims on water are about one quarter of the distance of actual.

I wish to be refunded for this investment. Totade I have paid \$366.30 to principal and \$149.70 to interest, balance owing \$1624.70.

This is the second letter so I am asking you again for an answer before I proceed further. Please advise me promptly on this matter.

Sincerely,



Paul E. Otis  
25 Wiltshire St.  
Larkspur, Calif.







10/17/62  
C 885 10/8/62 <sup>10/17/62</sup> <sup>Seliger and Lott</sup>  
Dear Sir: <sup>Glover</sup>  
In reply to your letter of Oct 4th.  
received by me 10/8/62.  
Some time back I wrote and asked  
for my money to be refunded, but  
was refused.

I was misrepresented on this land as  
being lush, when it is nothing but  
sand and sagebrush. When you were  
asked by the Real Estate Commission to  
quit and refrain from any more  
land sales in Nevada, I could not  
be making any more payments so  
I have now turned it over to our  
attorney and you will hear from him



a few days.

respectfully

Henry Pearson

~~address~~ → 3830 Loma Lane

Baldwin Park  
Calif.

Ranch No. D-9-16



August 29, 1962

Whom it may concern

Dear Sir

I am one of the buyers on  
Cumb Ranch. I had intentions to go  
up & see it in August & got as far as  
Bison City, what I heard there made me  
reluctant. I bought this ranch with the  
express purpose of Farming it for me &  
my son. I found out now this ground  
is nothing but alfalfa & Tulech (hard to  
eat) where you can't dig it up & nothing  
will grow.

The man who sold it to me  
openly stated they were growing alfalfa  
there, also you had plenty of water  
(which you have not) & you were pulling  
the pipes through. I now find you  
even dig a well without permission  
on the state. The movies they showed  
me had lots of grass & trees. I stated  
I would only take it if it had trees on  
because I had sense enough to realize





that trees grow only where water is.  
Now I hear those movies were probably  
taken around upper Elko County - not on  
the land at all - to me this is false  
representation. I also went in to see Mr.  
Donald in Reno he informed me he  
was no longer attorney for Gamble Ranch  
the man I bought the property from is  
no longer with you, in all the news-  
papers you sent (I've kept them all) it stated  
we were growing fruit trees & all types  
of vegetation.

I want to know from you if  
the land is alkali & Kalechi then I either  
want another piece of ground that is  
not land, or refund my money

I remain

Mrs. Margaret Sheets

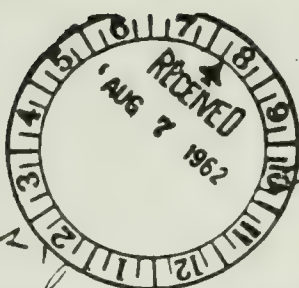


ORIGINAL LETTER SENT TO BERT R  
8/2/62

26.  
As regards the ten acres F-27-7  
we was buying from the Gamble  
Truck, it was misrepresented  
to us, we was told we was only  
1/2 <sup>drown</sup> from Water, and we understand  
it is being investigated and  
it not any of it what it is  
exposed to be, and that we  
are protected, so we are keeping  
contract till they can prove  
that it is what it has been  
presented to be. Sincerely  
Mr & Mrs Andrew Silva







Aug. 3<sup>rd</sup>

Dear Sirs  
After reading newspapers  
liking that you had been  
losed down and was a  
fraudlent co. and had  
misrepresented I don't feel  
can through any more  
money after bad. Thin  
after deciding to go ahead  
ending that \$100 just a  
month ago because was  
a little ahead and might  
not be later. Should have  
my head fixed.  
Looks like to me you  
could be forced to return  
the money.

L H Thompson  
3925 Redwood Highway  
Santa Rosa, Calif.



Case No. 33496-(EC) Crim.

U.S.A. vs Benaron, et al

Gov't Exhibit 3-547

Date MAY 10 1986. 3-547 Identification

Date MAY 10 1986. 3-547 In Evidence

Clerk, U.S. District Court, Sou. Dist. of Calif.

Wayne E. Payne Deputy Clerk

Wayne E. Payne

Case No.

VS

EXHIBIT 3-547

Date

No

Date

No

Clerk, U. S. District Court, S.

South 7th St  
San Francisco, CA 94103  
U.S. District Court  
of Calif

this in with buyers  
plan deal file.

old be no more problem.  
give  
10-1-62



September 28, 1962

G. Weller  
Special Collection  
Eighton Way  
Hill, California

M. Weller:

well aware I have not made payments since August, as I am very dis-  
satisfied the way things are handled.

raised this piece of land in good faith. The representative told  
it in five years or so the value of this land would be worth be-  
tween two and five thousand dollars an acre. Who could pass up something  
like that, I ask you? There has been too much written in the Los Angeles  
and Nevada papers against people buying such worthless land and I am  
one of the suckers. I continued to make payments until I received my  
statement and found out the valuation of the land purchased is only  
a total of \$50.00. I immediately wrote The Gamble Ranch Investment  
Company, 9412 Wilshire Blvd. telling them, too much has been written about  
worthless land and I wanted my money returned, as promised, if not  
satisfied, or a good explanation why I shouldn't continue to make pay-  
ments. I also told them I would discontinue payment until I heard from  
them. To date, I have not had one little note from them.

I am in a position to make full payment, but still want an explanation or  
answer to my questions. If I do not receive some sort of answer, or  
action immediately, will turn this matter over to my attorney.

I do not care for anything unpleasant and this is an unpleasant situation  
and I am sure to answer this letter and clear up statements, will be glad  
to hear from you, otherwise I will set here and do absolutely nothing.  
People do owe me an explanation of some kind.

Sincerely,

Margie E. Winter  
Margie E. Winter

2235K

Weller phoned 10-1-62

made her happy -

will bring payments current





## **APPENDIX C.**

**Miscellaneous Complaints Sent to Gamble Ranch Co.  
and Found in Company Files.**



1435 So. Stanislaus,  
Stockton, California,  
November 9, 1962

Gamble Ranch Development Corp.  
965 Brighton Way,  
Beverly Hills, Cal.

*Lodge  
checked  
11-11-62  
H.P.*

Dear Sir:

I have just returned from a visit to the town of Montello, Nevada,  
to see about the property that I had purchased and I feel that I have  
been a victim of a first grade fraud. This is a misrepresentation of your  
advertisement and brochures that were shown to me by your salesman, who  
magnified this transaction out of proportion with distorting facts,  
pamphlets, and movies.  
So, after viewing the property and talking to the local residences of  
Montello and Wells, Nevada concerning my investment I am taking legal action  
at once, as I do not intend to continue with this farce any further.  
I have had a talk with Mr. Wynne A. Savage, Real Estate Commissioner at  
Sacramento, Cal. and was told that all land sales of the Gamble Ranch  
ever stopped in California, due to the misrepresentation of facts.  
I have been advised to contract my lawyer, Mr. Bradford Jeffrys of the law  
firm, Jeffrys and Jeffrys, Barbour, and Gibson or Mr. Joseph O. Mc Daniels,  
District Attorney of Elko County, Nevada, who has handled several of these  
cases concerning this property. So, if I do not receive my money that was  
paid on this property by return mail I will be forced to start legal  
proceedings immediately, against the Gamble Ranch and all parties involved.

Contract No. 3343 and 3345:

Marv A. Gimenez

*Marv A. Gimenez*





October 8th 1962

Gamble Ranch Development Corp.  
9615 Brighton Way  
Beverly Hills  
Calif.

Gentlemen;

Pursuant to information in the July-August 1962

issue of "Real Estate Bulletin" as follows "Brought

W.H. Baker

1005 No. Grand Ave.,  
Covina, Calif.



Gamble Ranch Development Corp.

rip

9615 Brighton Way

Beverly Hills

Calif.

Our account No. 1264-- D-15-9

Yours truly

*Wm H Baker*

Mr & Mrs Wm.H. Baker  
1005 No. Grand Ave.,  
Covina, Calif.

CC-W.A. Savage Commissioner  
Division of Real Estate  
State Of California  
1015 L Street  
Sacramento, Calif.

Bert Ross:

Article referred to above is attached hereto -  
*gvt*  
10-10-62



October 8th 1962

Gamble Ranch Development Corp.  
9615 Brighton Way  
Beverly Hills  
Calif.

Gentlemen;

Pursuant to information in the July-August 1962  
issue of "Real Estate Bulletin" as follows "Brought  
into court, Johnston pled guilty, was fined \$525.00  
and given a 60-day suspended sentence, concurrent  
with a judicial order to refund all purchase or  
deposit moneys upon buyer's requests. etc.

We previously requested refund after having made the trip  
to the Gamble Ranch and discovered how much it had  
been misrepresented to us.

We are again requesting refund of all our purchase  
money (\$540.00)

Our account No. 1264-- D-15-9

Yours truly

*Wm H Baker*

Mr & Mrs Wm.H.Baker  
1005 No. Grand Ave.,  
Covina, Calif.

CC-W.A.Savage Commissioner  
Division of Real Estate  
State Of California  
1015 L Street  
Sacramento, Calif.

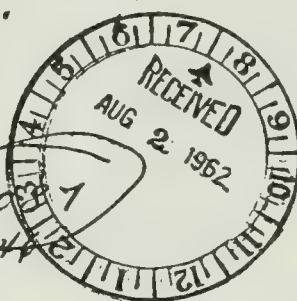
*Ross -*  
*file referred to above is attached hereto -*  
*gvtary*  
*10-10-62*



Aug 1, 1962

Pacific Westates Land Develop. Corp.  
2 Wilshire Blvd.  
Beverly Hills, Calif.

Re: Contract 10887  
Parcel F-13-44



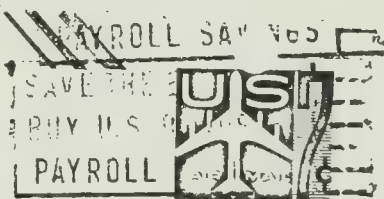
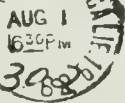
Gentlemen:

July 18, 1962 a local newspaper  
reported that California has banned  
selling anymore lots from



AFTER FIVE DAYS RETURN TO

Mrs. Angela Hernandez  
2465 Chestnut St. Apt. 302  
San Francisco, Calif.



PAR AVION VIA AIR MAIL CORREO AEREO

Pacific Westates Land Develop. Corp.  
2 Wilshire Blvd.  
Beverly Hills, Calif.

Please advise me of  
within 5 days, as my attorney  
standing by for the results of  
correspondence.

Respectfully,  
Mrs. Angela Hernandez





Aug 1, 1962

Pacific Weststates Land Develop. Corp.  
9412 Wilshire Blvd.  
Beverly Hills, Calif.

Re: Contract 10387  
Ranch F-13 44E



Gentlemen:

On July 18, 1962 a local newspaper reported that California has banned Nevada from selling anymore lots from Gamble Ranch acreage.

Because the true conditions of water and electricity were misrepresented to us as buyers, I feel that this investment does not warrant further monies.

I urge you to sell the acreage or return to me the monies already invested.

Please advise me of your intention within 5 days, as my attorney standing by for the results of correspondence.

Respectfully,  
Mrs. Angela Alimonda



re: Contract no. 1550  
Ranch No. D15-14

Jan. 20, 1963

To whom it may concern:

Dear Sir,

This is a request for the return of \$230.00 which we have paid towards a 2 1/2 acre parcel of the Double Ranch.

We have received a statement, upon request, from the B.B.B. and found it to be a bad investment.

The property was misrepresented to us. Therefore we have a legal right to have all money refunded.

We wish to do this out of court, but will go if necessary.

Please notify us, to your decision, within ten days, so we will know what action to take.

Sincerely

Mr. & Mrs. Arpaue





98 Lyndale Avenue  
Monterey, California  
September 24, 1962

William H. Ross  
San Diego, Calif.

Re: Gamble Ranch

RECEIVED  
SEP 28 1962  
WILLIAM H. ROSS

Dear Sir:

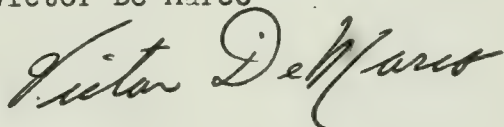
Mr. Anthony Verna has informed that he has settled his claim with Pacific Weststates Land Development Corp. without retaining a private attorney as we had previously planned.

We would also like to make a similar settlement because we feel that the salesman had made misrepresentations by stating that the soil was rich, fertile soil and water could be obtained at 8 to 20 feet.

Our balance due is approximately \$2,000. Your immediate attention to this matter will be greatly appreciated.

Yours very truly,

Victor De Marco





Oct. 1. 62.

Dear Sirs:

In reply to your letter on redem. side, I have no explanation as to my delinquent payments. I have listened to many things on T.V. concerning this Samble Ranch bit, and none of it has been in your favor. All I can tell is that, we've been taken!

Where money is concerned, we can get pretty blown up, either you show us positive proof of what has been said on your side is true and I mean the whole bit or we too can be funny;

Please prove to us that it is not a fraud, for we had honest intentions in buying as we hope you had in selling.

Truly M. Donahue  
and Joe John Donahue

10/20/62 ledger card noted - glw to J. Carey



WENDELL MACKAY

ATTORNEY AT LAW  
SECURITY BUILDING  
102 NORTH BRAND BOULEVARD  
GLENDALE 3, CALIFORNIA  
CITRUS 1-2189

OCT 22 1962

October 19, 1962

Real Estate Commission  
of the State of Nevada  
Las Vegas City, Nevada

Re: Cecil B. Van Sciver, 4731 Lowell Ave., } *ledger card as noted*  
La Crescenta, California, } *glw 10/20/62*  
Contract 2151, Ranch K-23-10 -  
and  
Charles Bradshaw, 7930 Wentworth, }  
Sunland, California, } *ledger cards sent glw*  
Contract G-572, Ranch E-25-7 and } *10/20/62*  
Contract G-576, Ranch B-7-13  
all with  
Gamble Ranch

Gentlemen:

Mr. Cecil Van Sciver entered into a contract with the representatives of the Gamble Ranch for the sum of \$4490.00 and has paid in the sum of \$1345.47.

Mr. Charles Brandshaw entered into two contracts with representatives of the Gamble Ranch, one for the total contract price of \$6,000.00, upon which he has paid in \$208.61; and the other for the total contract price of \$1,000.00, upon which he has paid in \$1107.10.

Each of my clients feels that there has been a fraud practiced upon them in this matter, and we are informed that your Honorable Commission has declared that the sale of the Gamble Ranch, or portions of the Gamble Ranch, constituted misrepresentation, if not fraud, and that you have ordered them to refund the money that each of the respective purchasers had paid in.

Would you please verify whether or not your Commission has issued such an order, and advise us how we should proceed to collect.

Very truly yours,

*Wendell Mackay*  
Wendell Mackay

Gamble Ranch  
9412 Wilshire Blvd.  
Beverly Hills, Calif.





1700 Lakely St.  
Beverly Hills, Calif.  
Sept. 30, 1962

Gamble Ranch

9412 Wilshire Blvd.  
Beverly Hills, Calif.

#2963  
P.

Last December my son Donald Biskara & I  
bought 10 acres in ~~K-35-39~~ sec. also my daughter  
Donna Miles bought 10 acres sec. ~~R-33-39-69~~. We <sup>knew</sup> ~~know~~  
we are buying undeveloped land, but we had a great  
deal of encouragement such as, by the month of May the  
land will be bladed - The land could be leased for alfalfa  
as it is now - The land has water now with-in 8  
feet of ground surface in two locations this gives indica-  
tion that drilling individual wells for each of 40 acres  
parcel in the Unit is a practical method of supply.  
development. You also promised for High Voltage lines  
for industries, you also printed in your Gazette the  
"Good News" of manufacturing & industries starting.  
You promised that the new highway is going through &  
in a few months it will be finished. Many encouraging  
ideas were written of many so called visitors, but one  
thing I can say is to see for yourself.

This summer my son Donald went on his vacation  
& went through Gamble Ranch. The land was there  
alright, but where are the stakes to the individual  
acreage that was bought by people like us. The High-  
way is far far from finished there was no blading or  
sign of it in our section at all. We were told we could  
lease the land for Alfalfa, will you please tell me where is the  
land & how can we lease such land?? If you can get



electricity why not get it? <sup>II</sup> We would like to put in  
our trailer for our summer vacations so we can go fishing  
& hunting as your salespeople talked. We hardly don't know  
what to think especially since we received a notice with  
your heading below Western Pacific Land development. I just  
wonder what how can we have any faith in this  
deal when we read a number of times in leading  
news papers where your salespeople have misled others.

Since the state of Calif. has forbidden the sale  
of any more land ~~in~~ at the Gamble Ranch. we  
are very discouraged & we are thinking of consulting  
a counselor to that respect. After all too much  
has been said & done in land development these  
days & believe me we had have all your promises  
in black & white, so I would like a full  
detail, why isn't the land ~~planted~~ as was promised  
why isn't there anything done about water, how can I  
lease the property to help us pay it up? These things  
are very important to us. I would appreciate an answer  
in the nearest future

Truly Yours  
Mrs. Emily Diskara





# 1542

Dear Sir :

Until I can find out more information concerning land that was purchased from Gamble Ranch and all the very unfavorable news that is now coming out concerning said property I will not send you any more money. In fact will do every thing I can to redeem money that has already been sent to you.

Its too bad that we have so many dishonest people in our country that will go to no ends to fraud other people out of their money.

Thanks.

Rich M. Lusser  
1019 2nd Ave.  
San Mateo, Calif.



photo made & filed  
ledger did marker

January 5, 1963

N. J. Rockel  
Candle Ranch  
15 Brighton Way  
Beverly Hills, Calif.

Re: Contract 2445  
K-13-21

Dear Mr. Rockel,

Last year I wrote you a letter about getting  
- refund on land we had purchased & on  
January 12, 1962 you wrote & said we would  
have to come into the office & sign paper.  
We came in & talked to Mr. Stein on January  
17 All he did was double talk us after  
we drove all that distance.

Later we received a letter from one  
of your lawyers saying no refund could  
be made as it wasn't misrepresented.  
Well, things have changed. We recently  
went to see our land & found it  
quite a joke compared to the brochures  
we have that the salesman left.  
We want our money back & we  
aren't going to make trips to your office



either as it's just something a waste time.  
unless we get some satisfaction in going  
to write to the Editor of Times newspaper  
(whose article I still have) who stated  
your company would make refunds.  
If that doesn't seem effective there are  
other ways.

Your early reply will be appreciated.

Very truly yours,  
Mrs. Stanley Olderp

Stanley G. Olderp  
753 Gondar Ave  
Long Beach 8, Calif.





August 3, 1962

Gamble Ranch Investment Company  
412 Wilshire Blvd.  
Beverly Hills, California

Dear Sirs:

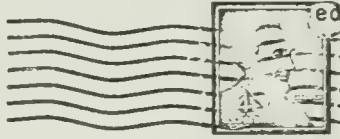
I have talked to my lawyer, Real Estate people and my Minister--"you  
now I have been taken".

You know I am a working woman and do not have money to throw away.  
My lawyer's representative was here two years ago and painted

pictures and said

*Margie E. Winter*

*7401 Wilshire Rd.  
Beverly Hills, California*



...lars an  
...ten acres  
...on of the  
...been taken.  
...Nevada pa-  
...resentation  
...ach rash

...perty and  
...it in the

GAMBLE RANCH DEVELOPMENT CORPORATION

9412 WILSHIRE BOULEVARD

BEVERLY HILLS

CALIFORNIA

...nia con-

...dishonest

ew/gh



Sincerely,

*Margie E. Winter*

Margie E. Winter



August 3, 1962

ble Ranch Investment Company  
2 Wilshire Blvd.  
erly Hills, California

r Sirs:

ave talked to my lawyer, Real Estate people and my Minister--"you  
w I have been taken".

know I am a working woman and do not have money to through away.  
n your sale's representative was here two years ago and painted  
h a beautiful picture of the land and showed me pictures and said  
hin five years the land would be worth several thousand dollars an  
e--I could not pass up such an investment--so I purchased ten acres  
-6. When I received the tax slip and found out the valuation of the  
d is only fifty dollars and taxes \$1.45, then I knew I had been taken.  
ently I have read too many articles in the California and Nevada pa-  
s concerning said land. Do you know this is fraud-misrepresentation  
land, etc. and you know what happens to people that makes such rash  
tements?

ave paid in over nine hundred dollars on this piece pf property and  
ould like to have it returned to me at once or I will put it in the  
us of my lawyer.

ave also written to the Real Estate Commissioner of California con-  
ning this matter.

m an honest woman and this hurts me deeply to find so many dishonest  
ple on the world.

xpect a reply to this letter immediately.

Sincerely,

Margie E. Winter  
Margie E. Winter



/gh



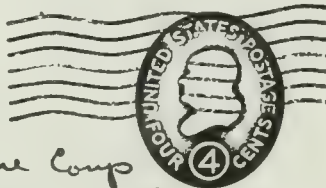


Sir:

I am writing this letter  
in regard of Contract G-931  
Ranch F-27-4. We bought  
this 10 acres on a interview  
by your Investment Counselor  
Allen. M. SKALE they tell me  
that he is no longer with  
the Company.

We have seen the  
property and we are disappointed  
in this whole matter has been  
misrepresented by your Investment  
Counselor that sold this property  
to us there is a few more  
property owners that are going  
to get together if our money  
is not returned to us that we  
have put into this land plus <sup>interest</sup> charges  
I like to say that we are going  
to get the backing of State Real  
Estate Commissioner Wynne A. Savage  
over. 47

L. V. Venable  
1321 Highland  
Brentwood



Gamble Ranch Dene Corp  
9412 Wilshire Boulevard  
Beverly Hills  
Calif





I have a copy of this  
letter I would like to  
have from your lawyer as  
soon as possible so I  
may use this money  
in a good investment.

I like to say there is at  
least a half dozen of us  
is going to get together to  
fight if we half and I  
hope before were are through  
we half a lot more on  
our side

Yours Truly

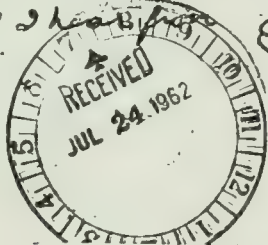
A L Venable

13432 Giordano

La Puente

ED 86275

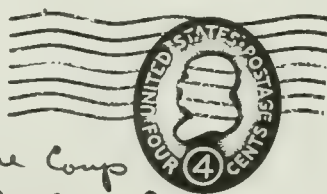
P.S. that will  
be no payment  
made at this time  
until I hear from  
you.



A L Venable  
13432 Giordano  
La Puente



Gamble Ranch Devel Corp  
9412 Wilshire Boulevard  
Beverly Hills  
Calif





2288 K  
ledger card marked  
38  
OCT 19 1962

October 18, 1962

able Ranch  
2 Wilshire Blvd.  
erly Hills, California

Clemen:

Since receiving your letter, in answer to my request  
a return of our money I am puzzled. Just what goes--?  
ave the clipping which says quote " If there are people  
feel they were not treated fairly, please advise them  
contact this office, and the money, regardless of the  
nt that they have paid---will be refunded in full  
diately." McDonald told the commission "we would be  
led pink to give anybody who was not satisfied his money  
."

You and I both know there was misrepresentation as to  
r--(there is no question on that--you lost a case  
ntly and that was one of the reasons). Shall I go on?

This is our last request for a refund, before seeking  
l advice.

erely yours,

ille T. Killalea  
ille T. Killalea





**APPENDIX D.**

**Exhibit 1-1125: Consent Agreement.**



Case No. 33496-(EC) Crim.

U.S.A. vs Benaron, etal

Gov't Exhibit 2-1291

Date 2-6-71 No. 2-1291 Identification

Date \_\_\_\_\_ No. \_\_\_\_\_ In Evidence

Clerk, U.S. District Court, Sou. Dist. of Calif.

Wayne E. Payne

Deputy Clerk

Wayne E. Payne





BEFORE THE REAL ESTATE COMMISSIONER  
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE SALE OF  
SUBDIVIDED LANDS IN THE AREA  
KNOWN AS "GAMBLE RANCH" BY  
PACIFIC WESTATES LAND  
DEVELOPMENT CORPORATION,  
GRACE & McCANN, INC., GAMBLE RANCH  
DEVELOPMENT CORPORATION, et al.

No. H-15321 LA  
ORDER TO DESIST AND REFRAIN;  
STOP ORDER; and  
CONSENT AGREEMENT

The Real Estate Commissioner of the State of California,  
having conducted an investigation into the above-entitled  
matter, has found and concluded from evidence satisfactory to  
him that:

I

The "Company" referred to herein is PACIFIC WESTATES  
LAND DEVELOPMENT CORPORATION which was incorporated under the  
laws of the State of Nevada on August 14, 1959 under the name  
"GAMBLE RANCH INVESTMENTS." The Company subsequently changed  
its name to WESTATES LAND DEVELOPMENT CORPORATION and thereafter  
to PACIFIC WESTATES LAND DEVELOPMENT CORPORATION. The Company  
was formed for the purpose of acquiring, and did acquire shortly  
after its formation, the title to approximately 236,000 acres  
of land situated principally in Elko County, Nevada, and commonly  
known as and referred to herein as the "GAMBLE RANCH."

II

GRACE & McCANN, INC., is a corporation organized under  
the laws of the State of California. GAMBLE RANCH DEVELOPMENT



CORPORATION is a corporation organized under the laws of the State of Nevada. Such corporations are owned, controlled and operated by the Company and/or by managing and controlling persons of the Company, as sales organizations, and are integral parts of the Company's operations.

### III

Since approximately December, 1960, the Company has been owned and controlled by J. J. Byrnes, Joseph Benaron and Samuel Reisman.

The present members of the Board of Directors of the Company now are John W. Carey, Helen Rubin, and R. N. Nickels.

The managing officers and employees of the Company until approximately April 15, 1962, included J. J. Brynes, President; John William Carey, Vice President; Helen Rubin, Secretary; and William Stein, Sales Manager.

### IV

Various parcels of the Company's properties on the Gamble Ranch have been subdivided and are the subject of Final Subdivision Public Reports issued by the Division of Real Estate of the State of California at various times between December 7, 1960 and April 3, 1962, which subdivisions are identified in the records of the Division of Real Estate as: RES LA 19472, RES LA 19473, RES LA 19474, RES LA 19475, RES LA 19768, RES LA 17803 and RES LA 21608.

### V

Subdivided parcels or lots of the said real property



owned by the Company, and known as the GAMBLE RANCH, having been widely sold and offered for sale to the members of the public residing in California, and the Company, with the knowledge and authority of its officers, directors and controlling persons, and acting by and through its duly authorized agents and employees, has published, distributed, issued and circularized by advertisements, brochures, letters, recordings, documents, pictures and other written and oral statements various representations and statements concerning such lots and parcels offered for sale, pertaining to the nature, condition, physical attributes, economic utility, status and desirability of such lots and parcels in California and to persons residing in California; and residents of the State of California have purchased or have entered into contracts to purchase parcels or lots of such subdivided lands owned by the Company in reliance upon one or more of such representations or statements.

## VI

The Company and each and all of the other persons, both natural and legal, named below, and for their respective heirs, assigns and successors in interest, agree, consent, waive and represent to and with the Commissioner and the People of the State of California as follows:

(1) They, and each of them, consent to the making of the Order hereinafter set forth and to each of its parts and terms, admit the truth of the recitals herein, and waive any and all defenses or objections whether known or unknown which they, or any of them, may now have or may at any time in the future have, to the form, substance, issuance and enforcement of said Order against them, or any of them; and

(2) They, and each of them, represent and agree that each and all of the legally required facts, and circumstances,





for the issuance of said order by the Commissioner exist, and more particularly that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 10086 of the Business and Professions Code and for the making of the Order hereinafter set forth pursuant to such section exist; and, further, that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 11019 of the Business and Professions Code and for the making of the Order hereinafter set forth pursuant to such section exist; and

(3) That each and all of them waive any and all rights which they, or any of them, have to a hearing by the Commissioner pursuant to and as provided for by Section 11019 as a condition to the making of the Order hereinafter set forth pursuant to said section, either prior to the making of such order or thereafter, and they, and each of them, agree that such Order shall have full force and effect as if a hearing as provided by such section had been held; and

(4) They, and each of them, waive any and all rights which they, or any of them, have to a hearing pursuant to Section 10086 of the Business and Professions Code, or any part thereof, and waive any and all rights which they, or any of them, have to make demands or requests as provided in such section, and to any provisions that the Commissioner initiate any proceedings for injunction, or otherwise, in the Superior Court of the State of California, and they, and each of them, agree that the Order hereinafter made shall have full force and effect under Section 10086; and

(5) They, and each of them, waive any and all rights which they, or any of them, have to judicial review of the Order



hereinafter made, either directly by mandate proceedings or otherwise or collaterally or by calling the validity of the same into question in any action, suit or proceeding, judicial or administrative; and

(6) They, and each of them, agree for the benefit of the People of the State of California, that they, and each of them, will abide by, obey and perform the terms of the Order hereinafter made, that such Order shall constitute a promise by them, and each of them, to the People of the State of California, for the breach of which the People of the State of California shall be deemed to be irreparably damaged, and for which legal relief shall be deemed to be inadequate, and they, and each of them, agree that the Commissioner and the People of the State of California, or either of them, may enforce or secure the enforcement of such Order or promise by temporary restraining order, preliminary and final injunctions in suits in the Superior Court;

(7) They, and each of them, agree and admit that this Order, including the recitals and the Order and each and every part of the same, are severable and that if any part, paragraph or phrase hereof shall be held to be invalid, either on its face or as applied to any person, then the validity and effect thereof as applied to any other person shall remain unaffected and the validity and effect of any portion or part thereof not found invalid shall remain in full force and effect.

## VII

In the making of the Order hereinafter set forth, the Commissioner has relied and does not rely upon each and all of the foregoing agreements, waivers, consents and representations made by such persons, named or referred to herein, and each of them.



NOW, THEREFORE, YOU:

PACIFIC WESTATES LAND DEVELOPMENT CORPORATION,  
also known as WESTATES LAND DEVELOPMENT  
CORPORATION, ALSO KNOWN AS GAMBLE RANCH  
INVESTMENTS; and  
GRACE & McCANN, INC.; and  
GAMBLE RANCH DEVELOPMENT CORPORATION; and  
J. J. BYRNES;  
JOSEPH BENARON;  
SAMUEL REISMAN;  
JOHN W. CAREY,  
WILLIAM STEIN;  
HELEN RUBIN;  
R. N. NICKELS.

AND EACH OF YOU, AND YOUR AGENTS, EMPLOYEES, HEIRS, ASSIGNS AND  
SUCCESSORS IN INTEREST, ARE HEREBY ORDERED to stop, cease,  
desist and refrain from selling or offering for sale, directly  
or indirectly, to any person within the State of California or  
to any person known to be a resident of the State of California,  
any lots or parcels of land in the area known as the GAMBLE  
RANCH, including but not limited to those lots and parcels as  
to which Final Subdivision Reports have been issued; and you,  
and each of you, and your agents, employees, heirs, assigns and  
successors in interest are further ordered to stop, cease,  
desist and refrain, directly or indirectly, from issuing,  
distributing, publishing or circulating within the State of  
California, or to persons known to be residents of the State  
of California, brochures, pamphlets, documents, letters, written  
or oral statements, recordings or advertisements of any kind  
whatsoever, whether by newspaper, radio or television or other-





wise, concerning such lands. This order effective July 16, 1962

DATED: July 13th 1962

W. A. Savage  
Real Estate Commissioner

W. A. Savage



BEFORE THE REAL ESTATE COMMISSIONER  
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE SALE OF  
SUBDIVIDED LANDS IN THE AREA  
KNOWN AS "GAMBLE RANCH" BY  
PACIFIC WESTATES LAND  
DEVELOPMENT CORPORATION,  
GRACE & McCANN, INC., GAMBLE RANCH  
DEVELOPMENT CORPORATION, et al.

NO. H-15321 LA

CONSENT AGREEMENT

WE, AND EACH OF US, the undersigned, for ourselves and for our respective heirs, assigns and successors in interest, whether by voluntary act or by operation of law, agree, consent, waive, and represent to and with the Real Estate Commissioner of the State of California and the People of the State of California, as follows:

(1) We, and each of us, have read and understand the foregoing Proposed Order, including the recitals therein, entitled, "In the Matter of the Sale of Subdivided Lands in the Area Known as 'Gamble Ranch' by Pacific Westates Land Development Corporation, et al.", No. H-15321 LA, Before the Real Estate Commissioner of the State of California; and we, and each of us voluntarily and freely agree, consent, waive and represent as herein set forth; and,

(2) We, and each of us, consent to the making of said Order and to each and every recital and provision therein, admit the truth of the recitals therein, and waive any and all defenses or objections, whether now known or unknown, which we, or any of us, may now have or may at any time in the future



have to the form, substance, issuance and enforcement of said Order against us, or any of us; and,

(3) We, and each of us, represent and agree that each and all of the legally required facts, conditions and circumstances, for issuance of said Order by the Commissioner exist, and more particularly that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 10086 of the Business and Professions Code and for the making of said Order pursuant to said section exist; and, further, that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the power conferred upon him by Section 11019 of the Business and Professions Code, and for the making of said Order pursuant to said section exist; and,

(4) We, and each of us, waive any and all rights which we, or any of us, have to a hearing by the Commissioner pursuant to and as provided for by Section 11019 as a condition to the making of said Order, either prior to the making of such order or thereafter, and we, and each of us, agree that said Order shall have full force and effect as if a hearing provided by such section had been held; and,

(5) We, and each of us, waive any and all rights which we, or any of us, have to a hearing pursuant to Section 10086 of the Business and Professions Code, or any part thereof, and waive any and all rights which we, or any of us, have to make demands or requests as provided in such section, and to any provisions that the Commissioner initiate any proceedings for injunction, or otherwise, in the Superior Court of the State of California, and we, and each of us, agree that said Order shall have full force and effect under Section 10086; and,





(6) We, and each of us, waive any and all rights which we, or any of us, have to judicial review of said Order either directly by mandate proceedings, or otherwise, or collaterally, or by calling the validity of the same into question in any action, suit or proceeding, judicial or administrative; and,

(7) We, and each of us, agree for the benefit of the People of the State of California, that we, and each of us, will abide by, obey and perform the terms of said Order; that such Order shall constitute a promise by us, and each of us, to the People of the State of California, for the breach of which the People of the State of California shall be deemed to be irreparably damaged, and for which legal relief shall be deemed to be inadequate, and we, and each of us, agree that the Commissioner and the People of the State of California, or either of them, may enforce or secure the enforcement of said Order or promise by temporary restraining order, preliminary and final injunctions in suits in the Superior Court; and,

(8) We, and each of us, agree and admit that said Order, including the recitals therein and each and every part of same, are severable and that if any part, paragraph or phrase thereof shall be held invalid, either on its face or as applied to any person, then the validity and effect thereof as applied to any other person shall remain unaffected, and the validity and effect of any portion or part thereof not found invalid shall remain in full force and effect.

DATED July 16, 1962.

PACIFIC WESTATES LAND DEVELOPMENT COMPANY

BY /s/ J. J. Byrnes President

(SEAL)

BY /s/ Helen Rubin Secretary



GRACE & McCANN, INC.

(SEAL)

BY /s/ John W. Carey President

BY /s/ Helen Rubin Secretary

GAMBLE RANCH DEVELOPMENT CORPORATION

(SEAL)

BY /s/ John W. Carey President

BY /s/ Helen Rubin Secretary

/s/ Samuel Reisman  
By Bertram H. Ross, his attorney-in-fact  
Samuel Reisman, Individually and as  
a major shareholder of Company

/s/ J. J. Byrnes  
J. J. Byrnes, Individually and as  
President of Company and as major  
shareholder of Company

/s/ John W. Carey  
John W. Carey, Individually and as  
Director and as Vice-President of  
Company

/s/ Helen Rubin  
Helen Rubin, Individually and as  
Director and as Secretary of Company

/s/ R. N. Nickels  
R. N. Nickels, Individually and as  
Director of Company

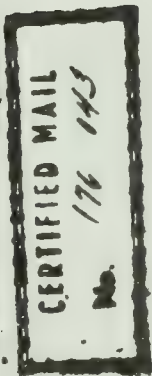
/s/ Robert L. Stein  
Robert  
William Stein, Individually and as  
Sales Manager of Company

/s/ Joseph Benaron  
Joseph Benaron, Individually and as  
principal shareholder of Company



John W. Carey  
c/o Pacific Westates Land Development Corpn.  
9412 Wilshire Blvd.  
Beverly Hills, California

RETURN RECEIPT REQUESTED







**APPENDIX E.**

**Exhibit BV: Letter From Department of Justice  
to Land Purchaser.**

**Exhibit 2-1291: Government Questionnaire Sent to  
Land Purchaser.**



United States Department of Justice

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF CALIFORNIA

600 FEDERAL BUILDING

LOS ANGELES, CALIFORNIA 90012

November 14, 1963

Dear Citizen:

There is now in progress an official investigation by the United States Department of Justice and the United States Post Office Department, concerning the use of the mails in connection with the promotion and sale of land on Gamble Ranch, Nevada. Your cooperation in answering the enclosed questionnaire will be of material aid.

Please answer the questions as fully, and in as much detail, as possible. It is realized that the matters about which this inquiry is made may have occurred some time ago and your memory may now be less than complete; therefore, your answers should be your best recollection at this time.

Since this is an investigation, it is requested that you treat this communication as confidential. Please complete the questionnaire, and return it, as soon as possible, in the enclosed envelope which requires no postage. Your cooperation is greatly appreciated.

Sincerely yours,

*Francis C. Whelan*  
FRANCIS C. WHELAN

Enclosure

Case No. 33496-(EC) Crim.  
U.S.A. vs Benaron, et al  
Deft Exhibit BV  
Date 5-13-68 No. BV Identification  
Date 5-13-68 No. BV In Evidence  
Clerk, U.S. District Court, Sou. Dist. of Calif.  
*Wayne E. Payne* Deputy Clerk  
Wayne E. Payne



Case No. 33496-(EC) Crim.

U.S.A. vs Benaron, etal

Gov't Exhibit 1-1125

Date 5-12-65 No. 1-1125 Identification

Date 5-12-65 No. 1-1125 In Evidence

Clerk, U.S. District Court, Sou. Dist. of Calif.

Wayne E. Payne Deputy Clerk

Wayne E. Payne





## Q U E S T I O N N A I R E

How did you first learn that Gamble Ranch land was for sale?

An advertisement in the T.V. Guide in the Times (Los Angeles) Paper

A. What contacts did you have with Gamble Ranch representatives prior to purchasing land on the ranch?

None

B. Did you purchase, or agree to purchase, any Gamble Ranch land? Yes If so, please answer the following:

1. When? May 11, 1961

2. Where was the contract signed? At our home.

3. How many acres did you purchase? 10

4. Price? \$2490.00

5. Legal description and Parcel Number:

South East one-quarter of South East one-quarter of the  
south-west one-quarter of Section 35, T. 39 N., R. 68 E.  
M.D.M.

6. Salesman's name? R. Gordon Heinzelman

7. Broker's name? Gamble Ranch Development Corporation

If a sales presentation was made to you, please answer the following questions:

A. What materials were shown to you by the salesman?

YES NO

1. Colored movies. — —

2. Colored film-strip and sound recording. x —

3. Colored brochure. x —

4. White-blue-black brochure. x —



	<u>YES</u>	<u>NO</u>
5. Colored photographs in looseleaf binder	_____	<u>x</u>
6. Miscellaneous letters (from Governor of Nevada, Nevada Ranch Service, A-D Machinery Co., etc.)	_____	<u>x</u>
7. Sheet depicting Victor Gruen "master plan" for development of the ranch.	_____	<u>x</u>
8. Other (specify) _____		

3. What, if anything, did the salesman tell you regarding each of the following subjects?

1. Water:

a. The availability of water (abundant or scarce, etc.)?

Abundant

b. Sources from which water was available (wells, water company, etc.)?

Wells

c. The distance from ground surface to water?

10 to 35 feet or more

d. The depth to which a well would have to be sunk in order to produce water sufficient for --

(1) house and garden use? 10 - 50 feet

(2) irrigation? \_\_\_\_\_

e. The depth of existing wells on the ranch?

\_\_\_\_\_

f. The cost of drilling a well for --

(1) house and garden use? \_\_\_\_\_

(2) irrigation? \_\_\_\_\_



g. The cost of equipping a well with pump and motor for --

(1) house and garden use? Not discussed.

(2) irrigation? "

h. The existence of State laws or regulations restricting the depth of drilling for, or pumping of, underground water?

Not discussed

1. Other representations about water?

None

2. Agricultural Potential:

a. The quality, nature, and fertility of the soil?

Could be very fertile.

b. The weather and climate (especially summer and winter)?

As would be expected of the locale.

c. Length of growing season (the period between killing frosts)?

not discussed

d. Existence of hazards to crops (frost, floods, wind, hail, dust storms, etc.)?

Not discussed

e. Crops that could be grown on your property?

not discussed

f. Yields that could be expected on the crops mentioned above?





- g. The possibility of farming the land for a living, or at least for some profit?

Not discussed.

- h. The cost of clearing the land and preparing the soil for crops?

Not discussed.

- i. Other representation concerning agriculture?

None

3. Electricity:

- a. The availability of electricity for

(1) household use? not discussed

(2) agricultural and industrial use?

- b. The cost of bringing electric lines to your property?

not discussed.

- c. Other representations concerning electricity?

None

4. Actual and Proposed Developments:

- a. Construction and maintenance of roads?

A new highway leading to the Ranch from Wells.

- b. Surveying of parcels, and staking of property so that it could be located?

Was in the offing.

- c. The planned shopping center?

Not discussed.



- d. Establishment of industries and businesses on the ranch?

Ashirt factory had opened, and a barber shop and beauty shop were almost ready to open.

- e. Government ownership of alternate sections of the ranch?

Was never mentioned.

- f. The financial ability of Gamble Ranch to carry out its proposed developments?

Seemed to have potential.

- g. Other representations concerning development of the ranch?

None

5. The Town of Montello:

- a. The size of the town and whether its population was increasing or declining?

Not much was said about the actual town.

- b. What schools are located there?

Elementary School.

- c. What stores, shops, and services are available there?

Several stores, and also two landing strips for planes.

Availability to the railroad was discussed.



d. Job opportunities and labor supply available there?

Not discussed.

e. Other representations concerning Montello?

None

C. To the best of your recollection, did the salesman furnish you a copy of the Subdivision Public Report issued by the California Division of Real Estate? Yes

1. When (before or after you signed the contract)?

Before

2. Describe in detail the manner in which the report was given to you:

Salesman handed the document to us and told us to read it. We did.

3. What did the salesman say about the report?

Do not recall.

4. Do you remember signing a copy of the report and returning it to the salesman?

~~No~~ Yes

For what purpose did you purchase the land?

## A. Living on the land

### B. Farming the land yourself

### C. Sharecropping

### D. Investment/Resale

E. Other (specify)

F. In the event you planned to use the land yourself, please state the approximate time when you intended to begin such use:





Have you ever visited the ranch property? Yes

A. On how many occasions? Once

B. On what approximate date or dates? August, 1961

C. Which of the following did you see?

YES      NO

1. The land you purchased        x

2. The town of Montello x       

3. The motel x       

4. The main ranch house x       

5. Crittenden Reservoir        x

6. Wells, springs, streams        x

7. Roads x       

8. Other features (specify)       

D. Was the appearance of any of the above items (that you saw) what you thought it would be? Yes  
If yes, which items?

All of it was what we had expected it to be.

If not, in what respect did the items differ from what you expected?

E. Were you escorted around the ranch by a Gamble Ranch representative? No. If so, who?         
What, if anything, did he say about the property?

F. Did you, or anyone that you know of, take photographs of the ranch property? Yes. If so, who (name and address)?

Mr. & Mrs. Walter A. Garrick - 3027 Delaware Ave., Santa Monica



In regard to your land sale contract:

- A. What was the amount of your initial deposit? \$125.00
- B. The amount of your monthly payments? \$35.00
- C. Total purchase price? \$2490.00
- D. Present status of your contract?

(Check appropriate Box)

1. Paid up ☐ Deed received ☐
2. Still paying on contract ☒
- a. What is balance due? \$1591.13 Amount paid in? \$898.87
- b. To whom are payments being made? Nevada Title Guarant  
Co., P.O. Box 1468, Reno, Nevada
3. Payments discontinued ☐
- a. When? \_\_\_\_\_
- b. Amount paid prior to that time? \_\_\_\_\_
- c. Why were payments discontinued? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- d. Were you ~~you~~ contacted by Gamble Ranch about continuing or resuming your payments?  
If so, what were you told and by whom?  
\_\_\_\_\_  
\_\_\_\_\_

E. Have you made any complaint, or request for a refund or cancellation? No

1. How many? \_\_\_\_\_
2. To whom? \_\_\_\_\_
3. Result? \_\_\_\_\_  
\_\_\_\_\_



4. What were you told about the availability of refunds, and by whom were you told it?

There was an article in the Times regarding refunds to those who were dissatisfied in any way, but we did nothing since we were satisfied with our deal.

5. Why did you make your complaint or request?

- F. Have you ever asked Gamble Ranch about publicity arising from proceedings against the company by the Nevada or California Real Estate Commissions? No

1. What were you told?

2. By whom?

- G. What papers, if any, do you possess which relate to your dealings with Gamble Ranch?

Original Contract - Payment booklet, letters from the Ranch from time to time, giving information regarding progress.

Have you made any effort to ascertain whether or not the land you purchased was fairly represented by the salesman and sales material? Yes - we went there. If so, what effort?

- A. Do you feel that the land was: (Check appropriate box)

1. Accurately represented

☒

2. Misrepresented

☐

3. Other (specify)





-11-

(Continue comments here):

Your Name(s): Walter A. Garrick

Address (home): 3027 Delaware Ave., Santa Monica, Calif. Phone: Ex. 3-4

Business Address: St. John's Hospital - Santa Monica, Calif. Phone: Ex. 3-95  
Ex. 3-35

Date: November 20, 1963



N O. 2 1 7 8 2

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SAMUEL REISMAN,  
JOSEPH J. BYRNES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

JAN 17 1958

WM. B. LUCK, CLERK

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

WM. MATTHEW BYRNE, JR.,  
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DAVID R. NISSEN,  
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Attorneys for Appellee,  
United States of America.

DORIS R. WILLIAMSON,  
Attorney,  
U. S. Department of Justice,

Of Counsel



N O. 2 1 7 8 2

IN THE UNITED STATES COURT OF APPEALS  
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WM. MATTHEW BYRNE, JR.,  
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Attorneys for Appellee,  
United States of America.

DORIS R. WILLIAMSON,  
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U. S. Department of Justice,

Of Counsel





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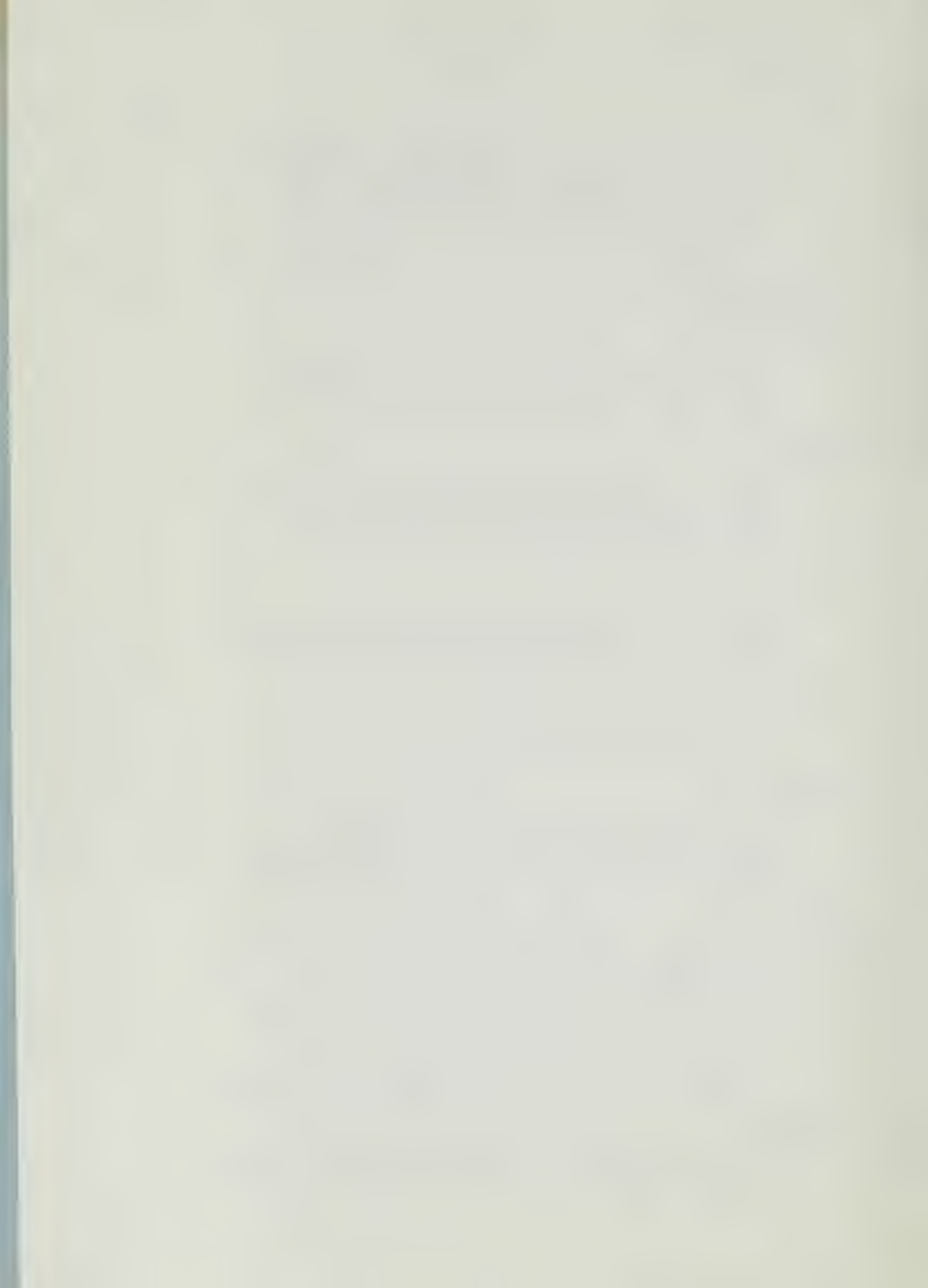
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N O. 2 1 7 8 2  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SAMUEL REISMAN,  
JOSEPH J. BYRNES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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I

JURISDICTION AND  
STATEMENT OF THE CASE

The Federal Grand Jury for the Southern District of California, Central Division, returned Indictment No. 33496-CD on April 2, 1964, charging appellants and nine co-defendants with mail fraud in violation of Title 18, United States Code, Section 1341. (C. T. 2-87) <sup>1/</sup> On April 6, 1965, trial by jury commenced before the Honorable E. Avery Crary, United States District Judge, (C. T.

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<sup>1/</sup> "C. T. " refers to Clerk's Transcript; Ex. refers to Exhibits; all undesignated numbers refer to the Reporter's Transcript.



731) and 13 weeks later, on July 2, 1965, verdicts of guilty were returned as to both appellants on 78 of 79 counts. (C. T. 1004) On August 10, 1965, the Court entered judgment of acquittal on Counts Two and Three as to each appellant. Both were sentenced to 10 months in prison, but sentence was suspended and they were placed on probation. Both were also fined \$800 on each of 38 counts, totaling \$30,400, (C. T. 1130) and on August 18, 1965, appellants gave notice of appeal. (C. T. 1136, 1138)

The jurisdiction of the District Court was based upon Title 18, United States Code, Section 1341, and this Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTE INVOLVED

Title 18, United States Code, Section 1341, provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented





to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

### III

#### STATEMENT OF FACTS

Since this is an appeal from a determination of guilt, the evidence and all reasonable inferences therefrom are to be viewed in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60 (1942); Kaplan v. United States, 329 F.2d 561 (9th Cir. 1964). Since appellant has submitted a "summary of the facts" of less than eight pages consisting almost entirely of Reisman's testimony and that of witnesses favorable to him, the Government furnishes the following brief statement of facts.



A.     BACKGROUND:

Gamble Ranch was purchased by B. M. Stewart's company in 1952 and was used principally for the production of livestock. (Stewart, 882-884) The ranch is approximately forty-six miles long and twenty-two miles wide, and most of it lies in the northeast corner of Nevada. (Ex 1-261, p. 9) The southeast portion of the ranch contains sage brush and was used as winter grazing land. (Stewart, 888-889) North and west of the railroad track which bisects the ranch are the ranch headquarters, feed mill, housing area, farming operations, and several reservoirs. (Stewart, 890) Stewart also installed eleven irrigation wells, and some roads, and brought electricity to the ranch. (Stewart, 892-893) Of the approximate one million dollars Stewart spent for agricultural improvements on the ranch, none was spent on the property southeast of the railroad. (Stewart, 917-918) None of the agricultural lands were there (Stewart, 898) and there were no man made improvements there other than three stock watering facilities. (Stewart, 891-892) Nor were there any springs, streams or pine trees on the flat land southeast of the track. (Stewart, 995, 916-917) Among local residents, this area is known simply as "the desert." (Pearson, 4960-4961) More than half of the ranch area is owned by the United States Government in the form of alternate sections of land. (Ex. 1-415, pp. 11, 15)

In June, 1959, Arnold Clejan purchased the ranch with a down payment and the balance secured by a trust deed and mortgage.



(Ex. 1-415, p. 9) The sale price averaged out to approximately \$10.00 per acre. (Stewart, 904) On September 9, 1959, pursuant to prior agreement, Joseph J. Byrnes and Joseph Benaron each purchased an undivided 5% interest in the ranch and agreed to lend Clejan \$23,000. (Ex. 1-415, p. 10)

Also in September, 1959, Clejan requested Stewart to come to Los Angeles where Stewart met Byrnes, Benaron, and Samuel Reisman. Subsequently, Stewart went to Elko, Nevada, with Clejan, Benaron and Reisman and negotiated the release of certain lands on the ranch from the mortgage. (Stewart, 908-909) Neither Clejan, Byrnes, Benaron or Reisman said what was to be done with the land Stewart was releasing from his mortgage except that it was to be resold in smaller parcels. (Stewart, 909-910)

In July, 1959, Clejan arranged a meeting with Governor Grant Sawyer of Nevada at which time Clejan said there was some feeling in California that Nevada did not welcome new people and that he would like something to show that Nevada wanted to be progressive and grow. (Sawyer, 1550) Sawyer furnished such a letter (Ex. 2-853K) but was never told it would be used in advertising or promotional material. During September, 1959, Sawyer saw his letter reproduced in a newspaper ad and protested. Thereafter, he met with Clejan and did not authorize use of his letter in advertising or promotional material. (Sawyer, 1550-1551) This latter visit with the Governor occurred during a trip to Nevada in October, 1959, by Clejan and Allen. (Allen, 984) Prior to the trip, Allen and Clejan discussed the Governor's objection to the use of





his letter with Byrnes, Benaron, and Reisman. (Allen, 992) During this conference with the Governor, Clejan and Allen advised Sawyer that his letter would not be used in any future advertising, and this conversation was reported to Benaron, Byrnes, and Reisman upon their return from Nevada. (Allen, 993-994)

The Nevada trip of October, 1959, by Clejan and Allen was also made for the purpose of establishing that the 40 acre parcels being sold on Gamble Ranch were commercial agricultural property not requiring a California Real Estate Commission public report. (Allen, 984-985) Allen discussed this matter beforehand in the Gamble Ranch office with Clejan, Byrnes, Benaron, and Reisman. (Allen, 985) On the trip, Clejan, and Allen were told by agricultural experts that a person farming such a 40-acre parcel would need other employment to supplement his income. They were also told that a study of water resources would be required and that tests of various areas would be necessary. It was also suggested that agricultural field experiments should be conducted. Allen reported these conversations to Byrnes, Benaron, and Reisman. (Allen, 987-990) Stewart had continuous conversations with Reisman and Benaron about the releases of land since October, 1959. (Stewart, 915) None of the lands released from Stewart's mortgage consisted of the improved lands to the northwest of the railroad, and none contained any of the water or agricultural improvements. (Stewart, 910)

Clejan had Allen prepare an application to the California Real Estate Commission for a public report prior to September



1959, and then attempted to withdraw the application. (Allen, 994-995) After this, Allen brought Reisman to the Real Estate Commission on behalf of Clejan. (Block, 7152-7153) Thereafter, on November 6, 1959, there was served upon the Gamble Ranch office, an order (Ex. 1-237) halting land sales until a public report was obtained. (Allen, 995-996) Allen discussed the contents of the order with Byrnes, Benaron and Reisman, including the matter of answering the various contentions and allegations which it contained. (Allen, 998-999, 1010) Paragraph 5 of the order [which is reproduced in full as Appendix A] stated: "It appears that many of the representations and much of the material which you have used or which you propose to use in offering said Nevada land for sale is incomplete, misleading or deceptive and that its use will result in a fraud upon the buyers, investors and the public." (Ex. 1-237; 1001) Allen, Clejan, Byrnes, Benaron, and Reisman discussed this and felt that their selling materials were not deceptive. (Allen, 1001) Paragraph 8 of the Commission's order stated in part:

"Further, the blue sales offering brochure (Ex. 2-19) describes the property as:

' . . . a range land, so abundant, so fertile  
. . . fertile ranch land; valuable ranch land that  
offers you security . . . working ranch land that will  
provide income for you and your family . . . once in  
a lifetime opportunity to invest in ranch land . . . the  
greatest investment value in the United States is now  
yours . . . rolling, rich valleys of verdant range and



meadowland . . . abounding in springs, streams,  
and reservoirs . . . with winters that are generally  
mild and comfortable . . . has the flexibility of modern  
ranching . . . with capabilities and facilities for herd-  
ing, fattening \* \* \*

The abundant water supply on the famous Gamble  
Ranch provides a rich and fertile cropland for alfalfa,  
grain truck farming and orchards \* \* \*

Much of the foregoing representations in the  
blue brochure appears to be blatantly misleading  
and deceptive." (Ex. 1-237, 1002-1003)

Another item of discussion between Allen, Clejan, Byrnes,  
Benaron, and Reisman, was the charge in paragraph 6 of the order  
that a photograph in the brochure was not a picture of the Gamble  
Ranch. All agreed it was not, but said it represented generally the  
land in the area. (Allen 1001-1002) After the Order of November 6,  
1959, Reisman handled a great part of the matter dealing with the  
application for a public report, (Allen, 1000) and the problems  
arising from the Commission's Order. (Clejan, 4536)

In December, 1959, Byrnes, Benaron, and Reisman visited  
Gamble Ranch. (Stewart, 953-954; Allen, 1129-1131) By the end  
of 1959, both Byrnes and Reisman had become officers and directors  
of the company. (Ex. 1-261, p. 20) Reisman was President.  
(Benaron, 12288) On March 24, 1960, Reisman loaned \$10,000 to  
the company. (Ex. 1-261, p. 28) Reisman purchased stock in the





company in June, 1960, (Reisman, 13284-13285) and made additional loans to the company of \$10,000 in June, 1960, and \$5,000 in September, 1960. (Ex. 1-415, p. 28) Despite claims that he was merely attorney for the company, (Reisman, 13154) Reisman never billed the company for any of his services. (Nickels, 13232) Prior to September 28, 1961, Reisman and Byrnes had come to hold identical stock interests in the company, exceeded only by the stock holdings of Benaron. Byrnes had become President as well as director, and Reisman was "Director, Chairman of the Board, and Chief Executive Officer." (Ex. 1-271, pp. 19, 21) In the 2 years from November 1, 1959 to August 31, 1961, the company had gross sales in excess of \$5,858,000. (Ex. 1-261, p. 17) Sales projections for the future showed a fantastic figure of \$81,000,000. (Exs. 1-79, 1-769, 1-829)

B. PROMOTION AND SALES.

1. Advertising

Gamble Ranch land was advertised extensively on television and radio, and by direct mail, newspapers and magazines, as well as at fairs and trade shows. (Ex. 1-261, p. 18) The first advertiser of Gamble Ranch land was John D. Roche who was hired by Clejan in June, 1959. (Roche, 1147) Roche prepared brochures and newspaper advertisements. (Roche, 1158) Roche always submitted his material for approval, and initially this came from Clejan. Byrnes was present with Clejan almost from the beginning



in 1959 and came to some of the advertising meetings. (Roche, 1159-1165) In the spring of 1960, Clejan's activity for Gamble Ranch became almost non-existent. (Allen, 1133) About September, 1960, Reisman and Benaron began to attend meetings for the approval of advertising. These meetings occurred weekly, every two weeks, and sometimes monthly. (Roche, 1159-1167) At Roche's initial meetings with Reisman and Byrnes, he was instructed to submit all advertising to Reisman's office and he did so. He received his proofs from Reisman's office and made the changes indicated. (Roche 1174-1177) Roche produced five different versions of the blue brochure. The first edition (Exs. 2-19, 20) was delivered August 13, 1959; the second edition (Exs. 2-21, 22) was delivered in October, 1959; the third edition (Exs. 2-23, 24) was delivered in December, 1959; the fourth edition (Exs. 2-25, 26) was delivered in February, 1960; and the fifth edition (Exs. 2-27, 28) was delivered in September, 1961. (Roche, 1153, 1157-1158) The first edition was the brochure referred to as deceptive by the Real Estate Commission's Order of November 6, 1959 (Ex. 1-237) and referred to Gamble Ranch as "Rolling-rich valleys of verdant range and meadowland . . . abounding in springs, streams and reservoirs, " "abundant water supply, " "fertile crop-land for alfalfa, grain, truck farming and orchards. " It also contained the Governor's letter.

Production of the first full-color brochure (Ex. 2-128) started in November, 1960, and it was published in February, 1961. (Roche, 1258) The manuscript (Ex. 2-127) for the brochure was



prepared and discussed with Reisman and Ross in Reisman's office and Roche received the manuscript from Reisman's office with the notation "approved with corrections." (Roche, 1253-1254) This brochure contains ten colored pictures, none of which depict the land being sold, and refers to "the city of Montello" on the ranch as "an established community of homes, shops, restaurants, motels, schools (including a major High School)," and as having "all normal shopping facilities." It also refers to the land as "these lush farm lands," and states that "abundance of water irrigation systems provides fertile croplands . . .," and that "industry is being coaxed because of the favorable labor pool existing here." The second full-color brochure (Exs. 2-129, 130) was completed in October, 1961. (Roche, 1157-1158)

The newspaper advertisements prepared by Roche are contained in Exhibit 2-1074. (Roche, 1319-1320) These ads contained references to "fertile crop land," (p. 8) "not desert and rocks but workable land . . . land that will produce," (p. 6) "Good arable land that should be farmed," (p. 21) "abounding with springs, wells, streams, sub-surface water deposits, rain and melting snow . . .," (p. 6) "This abundant water supply on Gamble Ranch provides a rich and fertile crop-land," (p. 6) and "Water is plentiful . . . this precious commodity is in abundant supply." (p. 21) It also contained the Governor's letter.

About July 4, 1960, advertiser Ernest Beatie was hired by Benaron, Byrnes, and Clejan to produce radio and television commercials for Gamble Ranch while Roche was handling the brochures





and newspapers. (Beatie, 1466-1469) He prepared his commercials from materials supplied him, and always submitted his copy to Reisman for approval before using it. (Beatie, 1470-1474, 1483) Advertising meetings at the Gamble Ranch offices were attended by Benaron, Byrnes, and Clejan. (Beatie, 1475) Beatie did not clear his ads with anyone other than Reisman. (Beatie, 1479) Beatie's radio copy (Ex. 2-1) and television copy (Ex. 2-2) were regularly furnished to Byrnes, Benaron, and Reisman. (Beatie, 1487, 1509-1519) Beatie's television ads produced for Gamble Ranch are on film (Exs. 2-1063A, 2-1064A) (Beatie, 1591) In July and August, 1960, Byrnes, Benaron, and Reisman attended advertising meetings at which copy was discussed. (Beatie, 1579-1580) Beatie always received approval for his ads from Reisman, not Burt Ross, (Beatie, 1583) and none of his copy was submitted to the Real Estate Commission. (Beatie, 1668) His services were terminated in late 1961. Beatie's advertising referred to Gamble Ranch land as "Rich fertile valley land," and "here are streams, springs, wells, crystal clear reservoirs and lakes . . . in an area of Nevada that abounds in streams, wells, fertile croplands."

The next advertiser was Joel Douglas who was hired by Byrnes and produced newspaper, radio, and television ads from October 8, 1961 to July 1, 1962. (Douglas, 1689-1691) Douglas' regular procedure was to prepare ad copy from materials supplied him, show the copy to Byrnes, and then submit the copy to Reisman's office. (Douglas, 1691-1694) This is illustrated by Douglas' letter to Reisman (Ex. 2-1021-A) concerning a newspaper ad sent to



Reisman for approval, and copy containing corrections and the initials of Reisman. (Ex. 2-1021-B) (Douglas, 1705) Douglas' advertising material (Exs. 2-31 through 2-43, 2-156, 2-164 and 2-167 through 2-170) (1697-1700) contains such statements as " . . . tremendous industrial and population expansion is now slashing Gamble Ranch into parcels of acreage. . . ." (Ex. 2-39) Douglas never visited the ranch and relied upon the material supplied him for his ads. (Douglas, 1718)

Emery L. Chase handled Gamble Ranch advertising in the San Diego area from May, 1961 through July, 1962, including radio, television and newspaper ads. He prepared all ads from material supplied by the company and never saw the ranch himself. (Chase, 1945-1948, 2066) Chase place no advertising without the approval of the Los Angeles office of Gamble Ranch, and he sent his copy there or to the company attorney and often received it back with corrections or additions. (Chase, 1949) Chase occasionally met with the company principals concerning advertising. (Chase, 1951) Chase met Byrnes on several occasions (Chase, 1998-1999) and also communicated directly with Reisman by telephone, (Chase, 2056) and in writing, (Chase, 2052) concerning advertising copy. (Chase, 2057-2066) An example of this is a letter (Ex. 2-1019) replying to an inquiry of Reisman concerning a Chase ad. (Chase, 1982-1983) Chase's ads (Exs. 2-131, 2-135, 2-136) which show company corrections, contain such statements as "fertile earth" (Ex. 2-136A) "Industry has come here, a town is growing." (Ex. 2-136R) "Gentle winters and comfortable summers." (Ex. 2-136-W)



"The land here is abundant in feed and water." (Ex. 2-136-Z-8)

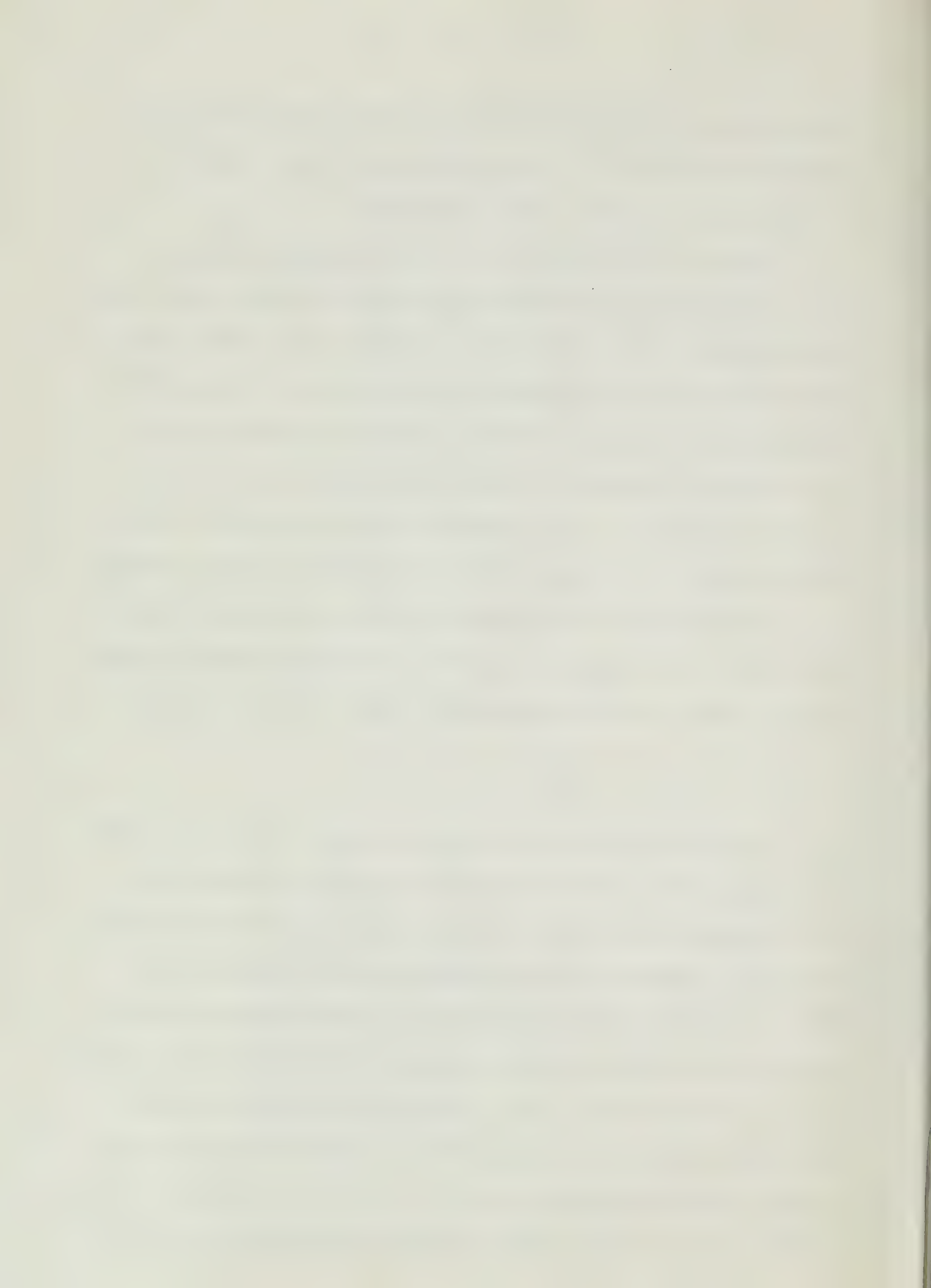
"The town of Montello . . . is growing with schools, churches, stores and restaurants." (Ex. 2-136-Z-10)

Gamble Ranch purchased radio advertising time from Sacramento radio station KRAK beginning in November, 1961, and ads were aired three times a week. (Spaner, 2242-2247) Their advertising was discontinued in February, 1962 for non-payment. (Spaner, 2248) The Gamble Ranch radio scripts (Exs. 2-280, 2-281 and 2-282) refer to Gamble Ranch land as "Rich land, unequalled anywhere . . . land with a richness unexcelled," "Real rich lush land," "for a fraction of what you might pay for a desert lot," "Water comes to the surface and flows through green valleys into several reservoirs, through the many springs existing on the ranch," and "there is an abundance of water on Gamble Ranch."

## 2. Sales.

Most of the company's land sales were made under retail installment sales contracts with a down payment followed by a monthly payment including 6% interest on the unpaid balance. The installment payment periods ranged from five to eleven years. Sales were made through salesmen and brokers in the company's main office in Beverly Hills, its branch office in San Diego, and in other cities and states. (Ex. 1-415) At the outset, sales were managed by Gifford and Cagan; (Clejan 1284-1285) but were soon replaced by sales manager Gabbert. (Block, 7055) Gabbert left in 1960 and in the middle of that year Byrnes and Benaron met with







Clejan about hiring Charles Escarzaga as the new sales manager. Clejan objected to hiring Escarzaga because he was too aggressive and high pressure, but he was hired anyway, and some months later, Byrnes told Clejan that the latter had been wrong about Escarzaga and that under Escarzaga's direction, there had been a tremendous increase in sales. (Clejan, 4393-4410)

Escarzaga originally was hired as assistant sales manager in February, 1960, and in August, 1960, was promoted to sales manager which position he held until September, 1961. Weekly sales meetings were held for the approximate 80 salesmen in the main office. At these meetings sales pitch demonstrations were given and Escarzaga orally passed on new information for the salesmen to use. (Escarzaga, 3102-3144) This oral information came to Escarzaga from Byrnes, Benaron, and Rockel, and concerned roads, a gambling casino, tree planting, motel and pool, Sears Roebuck warehouse, and the industry subsidy program. (Escarzaga, 3144-3152) Salesmen were equipped by the company with a full array of sales materials. (Escarzaga, 3107-3109) Byrnes, Benaron and Reisman were in the company offices, and Byrnes attended some of the sales meetings. (Escarzaga, 3132-3136)

On one occasion, a big meeting of potential customers was held at the Beverly Wilshire Hotel and Byrnes, Benaron, and Reisman were present. (Escarzaga, 3158, 3171-3172) Escarzaga gave a sales presentation to the assembled potential buyers and used all of the company sales materials. (Escarzaga, 3159-3164) Escarzaga attended meetings at which advertiser Roche showed his



copy to Byrnes, Benaron, and Reisman, and Reisman would make any necessary changes. Byrnes, Benaron and Reisman also attended similar meeting with advertiser Beatie. (Escarzaga, 3169-3174) Escarzaga knows of no salesman fired for making misrepresentations. (Escarzaga, 3157)

Robert Stein replaced Escarzaga and became the last sales manager. (Stein, 4725) His salesmen had all the materials shown on the sales material roster. (Ex. 2-214) (Stein, 4728-4735) While he was still Escarzaga's assistant, he heard Escarzaga give a sales demonstration in which he said that if California disapproved of the land, Gamble Ranch could not have obtained a public report covering it. (Stein, 4765) On one occasion, Byrnes removed his own name from a Gamble advertisement and inserted Stein's name. (Stein, 4470) Thereafter, the Better Business Bureau complained (Ex. 2-1018) to Byrnes about use in the ad of the word "investment" to describe the land and said that "speculation" was accurate. Byrnes replied (Ex. 2-1018) that use of the word "investment" would be discontinued, but actually subsequent advertising continued to use the word. (Stein, 4771-4778, 4907-4908) Stein discussed complaints of misrepresentation by salesmen with Byrnes, (Stein, 4814-4838) however, to Stein's knowledge Gamble Ranch did not "shop" any of its salesmen to determine if they were making misrepresentations. (Stein, 4800) Although Stein received a memorandum (Ex. 2-853-D) directing that no statements were to be made other than those contained in the public report -- which said that electricity was unavailable and the soil was poor and contained



alkali -- Stein and his salesmen were not prevented from using the film strip (Ex. 2-1059) which states "electricity is here" and refers to the land as "fertile", or the industry subsidy letter (Ex. 2-1035) which says that "electricity is in, ready to be used today, not tomorrow," or any other sales material of the company. (Stein, 4911-4913)

The following is a short history of a few of the many promotional materials furnished to salesmen:

- a. Governor's letter (Ex. 2-853, 854)

In 1959, Clejan informed the Governor of Nevada that he had a prospective group of investors who intended to participate in his Gamble Ranch program and who were going to help him develop the ranch. Clejan said these persons were concerned because they understood Nevada officials were not in favor of the development and wanted to resist growth in the state. Governor Sawyer said that this was not so and that Nevada wanted to encourage economic development. Clejan asked for a letter so stating, which he could show to his investors. (Williams, 1722-1724) Sawyer was never told the letter would be used in advertising or promotional material and he never authorized such a use. (Sawyer, 1550-1551) In September, 1959, Sawyer saw his letter reproduced in a newspaper ad and protested. (Sawyer, 1551) Clejan told Sawyer the letter would not be used in any future advertising material, and Byrnes, Benaron, and Reisman were so advised. (Allen, 991-994)





Thereafter, the letter was removed from newspaper ads and from brochures which were sent through the mail, (Exs. 2-1074; 2-19 through 24) and the letter was instead inserted in the film strip (Ex. 1058) and the sales kit (Ex. 2-213) which the salesmen retained, and was also enlarged and placed in the company office as a poster. (Ex. 2-1078) In July, 1961, when Governor Sawyer learned that his letter was still being used in the promotion he made a written protest to the company. (Exs. 2-1227; 2-854-B; See Appendix H) Sawyer received a reply (Ex. 2-1227) from "Bertram H. Ross for Samuel Reisman" stating that Byrnes, Benaron, and Reisman had no previous knowledge of the Governor's desire that his letter not be used.

b. Nevada Ranch Service letter  
(Ex. 2-845)

In August, 1959, Clejan requested Fred Harris, operator of the Nevada Ranch Service in Elko, Nevada, to furnish a letter concerning the suitability of the Montello area to commercial agriculture. Clejan told Harris the letter was needed to satisfy requirements of the California Real Estate Commission. (Harris, 2142, 2151-2152) On November 6, 1959, the Commission's order halting Gamble Ranch sales called attention to the questionableness of using this letter in Gamble's promotion. (Ex. 1-237) However, use of the letter continued and finally Harris began receiving inquiries from purchasers who had seen it. (Harris, 2153) Harris then wrote Byrnes a letter (Ex. 2-1229) telling him to "cease using my



name and offices in vain in your promotional program," and stating that in the future, purchasers inquiring of Harris would receive a letter stating that Harris' original letter was intended to apply only to the agricultural lands of the old Gamble Ranch and not to the raw range lands being subdivided where surface irrigation water is non-existent and underground irrigation water is an uncertain quantity. (Harris, 2155-2156) It was only after this that use of the Nevada Ranch Service letter was discontinued. (Harris, 2157)

c.            A & D Machinery Letter  
                 (Ex. 2-1232)

In August, 1959, Clejan obtained from Harold Anderson of the A and D Machinery Co. in Nevada, a letter giving the cost of wells and pipes for domestic water service. (Anderson, 2376-2379) At that time he believed that the land being subdivided was the land under cultivation on the main ranch. (Anderson, 2430) There were no domestic wells southeast of the railroad. (Stewart, 891-892) Anderson never gave anyone permission to use his letter in the Gamble Ranch promotion. (Anderson, 2390) The questionableness of using this letter was called to the company's attention by the Real Estate Commission order of November 6, 1959 (Ex. 1-237), but its use continued.



- d. Victor Gruen sketches and letter  
(Exs. 2-856, 2-859, and 2-860  
through 868).
- 

In September, 1959, Clejan met with employees of Victor Gruen, city planners, and was told the steps involved in preparing a master plan for the ranch. (Genova, 1918-1919) Clejan said he would have to consult with Byrnes before making a decision. (Genova, 1920) The Gruen employees were asked if they would merely prepare sketches and they replied that they didn't do that, and that sketches could be obtained from any artist. (Genova, 1925) In February, 1960, the company signed a contract with Gruen for preliminary planning services. (Hotchkiss, 1793) Gruen's service terminated on April 15, 1960. Prior to that time, Gruen's staff had collected information from the company and had prepared sketches of a proposed town site and commercial center. (Hotchkiss, 1798-1799) These did not constitute a master plan and were merely preliminary plans leading to further study. (Genova, 1927-1928) Gruen did not spend a lot of time on the project and its personnel did not even visit the ranch because Gamble never authorized the expense. (Hotchkiss, 1800, 1908) Even from the preliminary work done, Gruen advised Gamble Ranch that its method of selling 10, 20 or 40 acres was inadvisable because they were too small for farming but too big for efficient development of utilities, roads, and community services, and alternative methods of selling reshaped parcels were suggested. (Hotchkiss, 1800-1801) The company continued to refer to Victor Gruen in its





advertising long after Gruen's services terminated, as is illustrated by a Roche newspaper ad of June 5, 1960, referring to a master plan "which is now underway to further enhance the value of this great investment opportunity." (Ex. 2-1074, p. 38) Enlargements of the Victor Gruen sketches (Ex. 2-1073A-K) were furnished to salesmen to show customers. (Stein, 4734; Escarzaga, 3356-3363) References to the Gruen material continued in the film strip (Ex. 2-1059) right to the end of the promotion despite the fact that Ross warned the company that continued use of such material could imply adoption of the plans. (Ex. 2-856) Actually, Byrnes, Benaron and Reisman acknowledged to persons other than buyers that Gruen's material constituted "preliminary plans" and that Gamble Ranch "has no present plans or means for the execution of the plans prepared by Victor Gruen Associates." (Ex. 10261, p. 11; Exs. 2-1016 and 2-384)

- e. Industry Subsidy Letters and Brochure (Ex. 2-1035; 2-1122 and 2-818 through 821, 824)

Benaron originated the idea for a financial assistance program for industries desiring to locate on the ranch. (Escarzaga, 3152) However, there was no cash available for that purpose. (Rockel, 5341) The job of formulating such a letter was given to Escarzaga, the sales manager, (Ex. 2-1035) and although it was in the form of a letter to industrialists, it was used as a sales tool. (Stein, 4735) The industry subsidy letter was a "sales document"



and Norman Rockel, the company manager, who had the responsibility of attempting to get industry to move to the ranch never saw it. (Rockel, 5342-5343) Burt Ross reviewed the industry subsidy material and wrote a memo dated December 27, 1960, to Reisman with a copy to Byrnes (Ex. 1-700) which stated with regard to the Industry Subsidy material:

"It appears to me that unless Gamble Ranch Development Corporation is financially prepared by its setup and capital structure to do these things that it states it will do in the brochure entitled 'Financial Assistance Program for Industrial Relocation' it is getting mighty close to the line of violating a federal statute commonly designated as the Mail Fraud Law." \* \* \*

In spite of this warning, the material was used -- on purchasers, not industrialists. (Jarrett, 3847) Not a single business ever received the subsidies stated in the brochure or letter. (Ex. 1-261, p. 11; 1-415, p. 14) Purchaser Robert Lytle prepared and submitted plans for his business to be subsidized as indicated in the company materials, but he never received a reply. (Lytle, 7965)

f. Film Strip (Exs. 2-1058; 2-1059)

In February, 1960, not long after Governor Sawyer first complained about the use of his letter in advertising and the



California Real Estate Commission called attention to the deception involved in referring to Gamble land as "rich and fertile cropland," (Ex. 1-237) a representative of Pace Productions met with Gamble Ranch about producing a sales filmstrip. (Ellis, 2070) Ultimately, the Governor's letter and the representations objected to by the Commission which had been removed from newspaper ads and brochures, found their way into the filmstrip. (Ex. 2-1058-A) This came about as follows: In the Spring of 1960, Robert Ellis of Pace Productions met with Clejan and Escarzaga. They gave Ellis printed matter from the Gamble Ranch stockroom and Escarzaga gave a sales pitch using company sales materials. This presentation was taped and from the foregoing materials Ellis made a script which he sent to the company for approval. Ellis then made a "storyboard" showing what pictures would go with the script. Ellis then flew to the ranch and spent several days attempting to get pictures which would match the storyboard. On his return, drawings were made and photographs selected from stock files and all pictures were shown to Gamble personnel including Byrnes, Benaron, and Reisman. Copies of the script were also given to each one and Reisman made several changes. Thereafter, approval of the script and pictures was given. The film strip and sound track were then shown to Byrnes, Clejan and Escarzaga. No changes were made and the film strip (Ex. 2-1058-A) and sound track (Ex. 2-1058) were reproduced in quantity. (Ellis, 2070-2084) When Ellis took the pictures at the ranch, he did not know which portion of it was being sold. (Ellis, 2116) The land south of Montello flattens out into a





plain with sagebrush on it and that is all. (Ellis, 2138) None of the filmstrip pictures are photographs of this flat sagebrush land, except perhaps the last two taken at sunset. (Ex. 2-1058-A) (Ellis, 2088-2102) (the first "film strip" is reproduced as Appendix B of this brief.)

In 1961, almost a year after the first film strip was completed in September, 1960, Escarzaga and Byrnes requested Ellis to remove the Governor's letter from the film strip and add a frame regarding a highway. (Ellis, 2098) The new script was again checked by Reisman (Ex. 2-300) and a new film (Ex. 2-1059-A) and sound track (Ex. 2-1059) were prepared. (Ellis, 2099)

When Reisman was interviewed by Postal Inspectors in July, 1962, he said that he had no part in the preparation of the Pace film strip and heard about it only recently. (Jacobson, 9176) At trial, Reisman claimed he had nothing to do with the first film strip despite the contradictory testimony of Ellis, Clejan (4412) and Escarzaga. (3183-3189)

Each salesman also had a sales kit (Ex. 2-213) containing colored photographs (Ex. 2-267-A-V) and black and white photographs. (Ex. 2-268-A-Z4) (Roche, 1283-1286) The photograph of flat sagebrush land (Ex. 2-267-V) (reproduced in Appendix C of this brief) was not required to be in the sales kit until Stein became sales manager. (Finn, 6774-6775) It was seldom, if ever, shown to purchasers. (See Schedule of Purchaser Witnesses, Appendix D)

The salesmen were trained by the company and were furnished company materials for use in selling. (Jarrett, 3840-3843;



Asin, 6478-6481; Finn, 6766-6771) The salesmen also used information passed on to them orally by the sales manager at the sales meetings, such as that concerning a Sears warehouse, air museum, gambling casino, industry subsidization, roads and surveying. (Jarrett, 3846-3849; Asin, 6482; Finn, 6771) The salesmen claim they did not make representations beyond those furnished by the company. (Jarrett, 3855; Asin, 6487) Virtually all complaints by victim purchasers referred to misrepresentations contained in the sales material. (See Appendix A, B and C, Appellant's Brief) Even "satisfied" purchasers called by the defense admitted that they did not rely upon representations in the company material and that it was the salesmen who had given them the accurate information. (Sekiguchi, 9412-9435; Boylan, 9814-9829)

In addition to materials furnished to salesmen, Gamble Ranch also produced and mailed to each purchaser monthly, a mimeographed newsletter called the Gamble Ranch "Gazette". (Ex. 2-204A) The Gazette was produced in the office by a secretary and contained information received from Byrnes, Rockel or salesmen. Secretary Maria Manzin would type a rough copy and send it to Reisman's office for approval. It would come back with Reisman's approval noted and with whatever changes were to be made. Occasionally, if time were short, she would secure Reisman's approval by telephone. She never mimeographed and mailed the Gazette out without Reisman's approval. (Manzin, 5774-5776) According to the Gazette (September, 1960, p. 1) its entire purpose was to keep purchasers "informed on 'what's happening' on the



## BIG RANCH. "

The Gazette (Ex. 2-204A) contained among many others, the following statements: "Men and Equipment . . . are currently building one hundred and thirty miles of road . . ." " . . . electricity can be brought in from Montello to the new tract. \* \* \* Time required: 60 to 90 days! This electricity will be available to the entire tract! Rate? \$10 per month, base rate!" "the lush property in Section F-25 has been divided into handy 10 acre-size ranches." "Soon to be operating in Montello: the new Montello Lumber Company." (April, 1960) "Victor Gruen & Associates, world famous master planners [are] heading up a plans board to insure the orderly and successful growth of our property." \* \* \* "Gruen's proposals will guide the developers of the new community." (May, 1960) " . . . Ray Blackwell sent out the call that he needed carpenters, cement men, plumbers, electricians . . ." "More Folks Moving Up . . . moving permanently to their ranch on the Gamble." " . . . a well known electronic firm is negotiating to put a plant right on the Gamble property . . . Many other kinds of industry are being contacted for our industrial sites." (June, 1960) "of all our ranch visitors, . . . the general concensus included raves over the beauty of our ranch, and almost all said, 'It is much nicer than we pictured it would be.' " (Sept. 1960) "Hit Big Well at New Motel Site!" "there will be plenty of water for irrigating surrounding acreage . . ." (October, 1960) "After months of careful planning, the Gamble Ranch Development Corporation is now entering into an intensive effort to locate industry and





manufacturing on the world famous Gamble Ranch. " (November-December 1960) "Maybe we'll have a shoe factory on the Gamble some of these days soon . . . " "Mr. Rybold . . . purchased a Ranch, and moved up immediately, lock, stock and barrell. " (March, 1961) "You are buying access to the business opportunities of a proposed city. " (April, 1961) "Negotiations are currently being conducted with several industrial firms with respect to possible location on the Ranch under our Industrial Subsidization Program. " "Isn't It Exciting? All This Activity!!" " 'Dutch is . . . preparing his ground prior to planting alfalfa. " (May, 1961) "Roads and property markings are progressing in accordance with our development program. " "Montello . . . this up-and-coming town. " " . . . these ranches are located in the commercial and industrial area. " "A valley of beauty and not desert sand. " "The grass is so green. " "the fertile valley. " (June, 1961) "Mrs. Ackerman said that she was just thrilled with the property. " "Maybe a television Repair Shop on Gamble . . . ?" (July, 1961) "The town of Montello is . . . installing an improved water system. " (October, 1961) "Now!! Financing For Your Home on Gamble Ranch!!" (December, 1961) "Industry Comes to the Gamble Subdivision. " "The Contract is signed!! Now It Can Be Told!!" "A local, established, clothing manufacturer will shortly move their complete manufacturing facilities to Montello. " (Feb., 1962) "Surveying Continues At Steady Pace. " "Road Blading Follows Survey Party. " "This [picture] is typical of the type of roads that will be made available to all parcels sold on the ranch. " (Jan., 1963)



The salesmen were required by law to furnish a California Division of Real Estate "Public Report" to each purchaser, but Clejan had originally sought to avoid this requirement by claiming that the property was commercial agricultural land for which a report was not needed. (Allen, 984, 985) However, the Real Estate Commission ordered (Ex. 1-237) sales stopped until a public report was obtained. (Allen, 995-996) Thereafter, Reisman and Ross met with Real Estate Commission representative Henry Block for the purpose of attempting to obtain a public report. (Block, 7050-7052) Reisman furnished the necessary documents and Block prepared a draft of the public report and displayed it to Reisman and Ross. (Block, 7052) Reisman objected to the "special notes" section which is the first page of the report and points out in all capital letters that the land is undeveloped and that electricity and other utilities are not available. Reisman objected to the format which made the "special notes" so prominent and thought they should be placed in the narrative section so that they would not be so prominent. However, Reisman contacted sales manager Gabbert to determine if they could sell with such a report and Reisman then advised Block that they could use the report in that form, and the report (Ex. 1-243) was issued. (Block, 7052-7056) The public report was regarded as a hindrance to sales, and Benaron instructed Escarzaga to get the most favorable report he could. (Ex. 1-764) Benaron also urged that a commercial agricultural classification be obtained so that they could discontinue using the public report. (Ex. 2-989; 2-1093) The public report was furnished only when



the law required it, and was not given to non-California residents. (Exs. 2-391; 2-397) Any questions raised in the mind of a purchaser by the public report were to be answered from company sales material. (Escarzaga, 3139) Many purchasers received their copy in the mail after the sale. (See Schedule of Purchaser Witnesses, Appendix D)

### 3. Development.

That the so-called "development program" of the company was merely a promotional gimmick is illustrated by Benaron's memorandum to Reisman, Clejan and Byrnes (Ex. 2-990) which states that there is an "absolute need" to begin a development program to insure that buyers continue their payments.

With regard to the "roads" which the Gazette (Ex. 2-204A) said the company was "building", the fact was that they consisted of a path through the sagebrush made by one pass of a road grader. These "roads" had to be bladed over because there was no way to keep them in repair so they could be used. (Blackwell, 6140-6142; Davidson, 3685) Byrnes caused the men working on the road blading to be instructed to work on Saturdays and Sundays when purchasers would be visiting in order to show progress. (Exs. 56; 2-683; 2-82, 87)

Although the Gazette (Ex. 2-204A) said that the company would survey and stake all parcels, the surveyor hired by Gamble Ranch established only the section corners and quarters in some townships, and never established the boundaries of any individual





parcel of 40 acres or less. He ceased all surveying when the company failed to pay him. (Settlemeier, 5106-5109)

Although the Victor Gruen sketches for a city and shopping center were merely preliminary, and in any event the company had no means for executing such plans (Ex. 1-261, p. 11), Byrnes issued orders for the blading of the "townsite" and shopping center as shown on the Victor Gruen plans. (Exs. 56; 1-45) At trial, Byrnes' only excuse for this action was that by clearing these areas of sagebrush and staking them, people would know that these were places where the company was not going to do anything. (Byrnes, 12785-12786)

With respect to the company's effort to locate industry on the ranch, the only success was a sewing factory which did not receive the subsidies stated in the industry subsidy promotional material. The company had no funds to establish any other facility on the ranch. (Ex. 1-415, p. 14) The "sewing factory" consisted of a building that was originally a garage. Mrs. Sikorski had some sewing machines put in and four or five ladies from Montello worked fairly steady for a while making western shirts. The factory started about June and by Christmas it closed. (Pearson, 4961-4966) Defense Exhibit AN, introduced by defendants as photos of ladies employed at the sewing factory, shows several women at the work tables who never worked there but were asked to sit there and have their pictures taken. (Pearson, 4962-4963; Stancil, 5074-5075)

In December, 1959, water engineer Thomas Stetson met



with Byrnes and shortly afterward spoke with Reisman. Stetson was hired to furnish a water report to be used in securing a public report from the California Real Estate Commission. The report was furnished in January, 1960. (Ex. 2-884) (Stetson, 10001-10002) A second water report (Ex. 2-885) was submitted under date of September 26, 1961, and was used as the basis for statements concerning water made in the company's SEC Registration Statement (Ex. 1-261, p. 4) filed on September 28, 1961. The first water report (Ex. 2-884) states that "there is a paucity of data regarding surface and ground water supplies in this area." (p. 1) It also makes six specific recommendations for comprehensive water investigation, and from well measurements, concludes that "ground water at the present time is within 8 feet of ground surface in at least two locations in the valley area. . . ." (pp. 15-16) The second report (Ex. 2-885) disclosed that the well measurements had been inaccurate and water was at 76 feet rather than 8 feet. (Maxey, 4256) The company had the second report prior to October 9, 1961, when the second full-color brochure (Ex. 2-129) was printed, (Roche, 1157-1159; Stetson, 10612) but the brochure still used the above quote from the first report referring to 8 feet. About the time of the first water report, Reisman informed Benaron and Byrnes of the "lack of reliable ground water data" (Ex. 2-883-N-1) but afterward, all three approved production of the Pace filmstrip (Ex. 2-1058) which stated in part:

"Water is in abundance. Easily drilled wells  
bring in plenty of water. Water in many areas is



just below the surface of the ground."

The same filmstrip also states:

"The consulting engineers, Stetson, Strauss and Dresselhaus, commissioned by Gamble Ranch, reported - The ranch lies in the Utah-Nevada water basin with no river outlet to the sea. All precipitation remains sub-surface, forming a vast lake beneath the land."

This is not true, and Stetson's firm did not make such a report. (Stetson, 10569-10572) Stetson did no water investigation in addition to that for the first report for the Real Estate Commission, and the second report for the SEC, until after sales were halted by the Real Estate Commission in July, 1962. (Stetson, 10581) The company's experience with wells drilled on the property offered for sale was uniformly poor. The Blackwell well drilled at the motel did not produce enough water and by trying to enlarge it the driller made a crooked hole. When test pumped, the well produced water for 15 minutes and then stopped. Almost a year went by without water other than what was hauled in by truck. (Blackwell, 6132-6137) The Stancil well produced only a trickle of water at 150 feet, and even when dug to 350 feet it did not produce enough to irrigate Stancil's land. (Stancil, 5083-5084) Stancil's well was taken over by Brown and dug to 610 feet. (Stancil, 5090; Maxey, 4386) The Patton well was drilled to 631 feet. (Maxey, 4387) No large yield well has ever been developed on the property





south of Montello. (Maxey, 4296) In northern Nevada, very few wells are pumped from depths of more than 100 feet because of the cost. (Maxey, 4386) The Nevelco well, drilled for a group of co-operating Gamble purchasers, was drilled very deep, possibly 800 feet, and did not produce enough water to take a bath. (Fleischmann, 8141) Despite this experience, Bert Ross' letters to purchasers told them (1) the company has been successful in every well drilled (Ex. 3-429), (2) water has been found at various depths for domestic wells (Ex. 3-474); and (3) the farthest the company had to drill for water was 345 feet, and many wells were less than 100 feet deep. (Ex. 3-459)

In January, 1960, Reisman called the Raft River Electric Cooperative manager, Edwin Schlender, and asked what it would take to get electric power out to the locations where people were buying land. Schlender told Reisman that if Gamble Ranch would sign a guaranteed revenue agreement Raft River could build the electrical lines, but no such agreement was signed. By letter of January 22, 1960, (Ex. 2-1248) Schlender advised Reisman that the estimated cost for serving the Gamble Ranch project with power would be \$1,500,000. (Schlender, 5224-5238) Purchaser Stancil learned from Raft River that it would cost him \$10,000 to bring electricity to his parcel. (Stancel, 5089) Despite the foregoing circumstances, the Gazette (Ex. 2-204-A) stated:

" . . . electricity can be brought in from Montello to the new tract. All we need are applications from the new property owners. Time required: 60 to 90



days! THIS ELECTRICITY WILL BE AVAILABLE  
TO THE ENTIRE TRACT! Rate? \$10 per month,  
base rate!"

The industry letter (Ex. 2-819-A) also claimed "electricity  
and power are in, ready to be used today - not tomorrow."

The town of Montello has dwindled in size from about 600  
people in 1941 to the place where from 1959 to 1963 there were  
only about 60 families in a radius of 35 miles around Montello. In  
Montello from 1959 to 1963 there was: (1) A cafe and bar, (2) a bar,  
(3) a general store, (4) a service station-garage, (5) the Post  
Office, (6) the railroad station, and (7) a Standard Oil bulk plant.  
There was no drug store or doctor, no clothing store, barber shop,  
beauty salon, or even a telephone available. The high school was  
closed and children take a bus to Wells, Nevada, a round trip of  
106 miles. (Pearson, 4943-4950) Despite this situation, Reisman,  
Byrnes, and Benaron approved (Roche, 1253-1254) the full-color  
brochure (Ex. 2-128) which states that the "city of Montello" is  
"an established community of homes, shops, restaurants, motels,  
schools, (including a major High School)," and has "all normal  
shopping facilities."

In 1959, agricultural experts at the University of Nevada  
advised Allen and Clejan -- and they in turn informed Byrnes,  
Benaron, and Reisman -- that successful agriculture on Gamble  
Ranch would require soil tests, water studies, and field experiments.  
(Allen, 987-990) The company made no extensive study of soil



conditions. (Ex. 1-415, p. 12) However, Clejan did ask purchaser Davidson to put his parcel under cultivation and said the company would finance the operation. The venture was unsuccessful because a well drilled by the company on nearby property did not produce enough water. (Davidson, 3500-3508) Purchaser Elwood was told that the company would lend him money to finance the farming of his parcel. Elwood met Rockel numerous times at the ranch but never succeeded in getting any funds from the company, and finally talked to Byrnes about a refund which was never given. (Elwood, 2887-2910) Purchaser Stancil tried to farm his land, but the well drilled for him by the company did not produce enough water and the venture failed. (Stancil, 5081-5085) The interest in promotion rather than serious agriculture is readily apparent from Byrnes' request to company manager Rockel to "find out what it would cost us to make a 40 or 80-acre parcel green, not necessarily productive." (Ex. 1-688) As of May 4, 1965, no purchasers had taken up permanent residence on their land, nor had any buildings except the motel been built on Gamble Ranch south of Montello. (Pearson, 4960)

### C. MANAGEMENT AND CONTROL.

By December, 1959, both Byrnes and Reisman had become officers and directors of the company. (Ex. 1-261, p. 20) Reisman was president. (Benaron, 12, 288) Byrnes had become a part owner of the ranch in September, 1959, (Ex. 1-261, p. 8) and Reisman became a stockholder in the company in June, 1960. (Reisman,





13284-13285) Reisman and Byrnes held identical stock interests in the company, exceeded only by the holdings of Benaron, and all three described themselves as "parents" in an SEC Registration statement, indicating that they controlled the company. (Ex. 1-261, p. 21; Abrams, 10496)

Advertising was reviewed by Byrnes and Reisman and cleared by Reisman. (Roche, 1174-1177; Beatie, 1470-1478, 1483; Douglas, 1691-1694; Chase, 1998-1999, 2052; Rockel, 5422-5424) Byrnes, Benaron and Reisman also met regularly with the sales managers. (Escarzaga, 3169-3174) Byrnes, Benaron, and Reisman came to the company offices, and Byrnes even attended some of the sales meetings. (Escarzaga, 3132-3136; Rockel, 5380)

Byrnes, Benaron and Reisman supervised and were kept informed of the "development program" for the ranch, (Weller, 3898-3906; Rockel, 5442-5467) and of the company's financial condition. (Carey, 96263) They were also notified of purchaser complaints. (Rockel, 5504-5508; Stein, 4814-4815) Company policy concerning delinquent customers was always cleared with Byrnes, Benaron and Reisman. (Weller, 5894, 5897) After publicity concerning refunds appeared, Byrnes, Benaron and Reisman held a staff meeting to decide how disgruntled buyers and refund requests would be handled. (Weller, 5916-5917)



D.        DECLINE AND FALL.

The technique used by appellants in selling their land was to talk about and picture features in isolated spots to the north of what they said was a 53 mile long ranch (Ex. 2-1058) and to sell desert land at the south. (Ex. 2-267-V) in writing to a bank (not a prospective purchaser), Byrnes stated that the land being sold is the "least desirable" on the ranch. (Ex. 1-169; 1-1085) Byrnes, Benaron, and Reisman told the SEC that "the parcels previously sold, and those presently available for sale are, in many instances, relatively less desirable from the purchaser's point of view than other more easily accessible and fertile tracts which are not presently being offered for sale." (Ex. 1-415, p. 18) By memo of July 20, 1960, to Reisman and Benaron, Clejan opposed a plan to sell the north part of the ranch and keep the south for subdivision purposes, on the ground that if they did not own the north part, "our references to streams, reservoirs, etc. would have to be discontinued." (Ex. 1-1084)

The company was not interested in having people see the ranch before they bought. Maurice Weiss wrote Clejan: "You suggested that I not send any more conditional [on seeing the ranch] sales . . . and I most certainly agree with the suggestion." (Ex. 3-973) When purchasers did visit the ranch they complained. Ranch representative Davidson received complaints from visiting purchasers that the land did not look like the film strip, and he passed these complaints on to Rockel, Clark, or Clejan. (Davidson,



3537-3539) Ranch representative Ray Blackwell notified Benaron by letter of March 3, 1961, that for him at the ranch it was "impossible to counter so many exaggerations" by the salesmen. (Ex. 1-827) On July 7, 1961, Blackwell notified Rockel that they were getting "a lot of unhappy customers" at the ranch. (Ex. 2-718) Byrnes was asked by Maurice Weiss to caution Davidson to refrain from telling purchasers the cost and depth of wells because it "may jeopardize our sales program." (Ex. 2-516)

Byrnes, Benaron, Reisman and Clejan were aware that the Gamble Ranch promotion was under scrutiny of various regulatory or investigative agencies almost from its inception. For example, the Nevada Real Estate Commission was known to have questioned representations made in sales materials prior to September 28, 1959, because on that date the company's sales managers wrote a letter (Ex. 1-984; 1-1018) answering the Commission's inquiry. The attention of the California Real Estate Commission was known to have been attracted to the promotion prior to November 6, 1959, because on that date an order halting sales and calling attention to numerous misrepresentations in a sales brochure was filed. (Ex. 1-237) Subsequently, the company learned that the Better Business Bureau was reporting adversely on the promotion. (Ex. 1-689) In mid-1961, Governor Sawyer complained of the continued use of his letter, accused the company of misrepresentation, and promised an investigation in Nevada. (Ex. 2-853) In October, 1961, advertiser Roche warned Benaron about misleading ads of advertiser Douglas and of state investigating agencies. (Ex. 2-364) During





the same month, it was known that the California Real Estate Commission was contacting Gamble purchasers and that an investigation was in progress. (Exs. 1-218; 2-474)

Reisman, Byrnes and Benaron began to show concern over avoiding trouble with the Real Estate Commissions (Exs. 2-1017; 2-363(P); Ex. FR), and some of the more glaring misrepresentations were removed from radio, television, newspaper and mail matter, and were placed in materials designed for private dissemination. Among the clearest examples of this is the radio and television advertising copy of Chase (Exs. 2-131, 135, 136) from which Reisman struck numerous representations concerning the land, the water and the development. However, Reisman approved the very same representations for inclusion in the film strip which was kept in the possession of the salesman. (Ex. 2-1058, 2-1059)

Also after becoming aware of investigations, Byrnes, Benaron and Reisman produced exculpatory letters and documents stating that the company policy was against misrepresentations and that company materials had been reviewed and found not to be misrepresentative. (Exs. 2-996, 2-997, 2-998, 2-999, 2-306, 1-570) However, Byrnes said that the statement of company policy was desired to show the Real Estate Commission (Carey, 6284-6285), and all of the company materials had not been reviewed as stated. (Rockel, 5426) Byrnes also had a letter sent to attempt to stop the Real Estate Commission investigation. (Ex. 2-186; Carey, 6299-6300) Reisman told Nevada Real Estate Commission Secretary McBride that Gamble had sold over 5 million in contracts and were



collecting half a million a month, that Reisman wouldn't let McBride stop him, and that Reisman would go over McBride, or through him. (McBride, 6804; Malone, 14193)

Complaints or allegations of deception and misrepresentation in Gamble Ranch sales material had been brought to the attention of Byrnes, Benaron, and Reisman on November 6, 1959, by the California Real Estate Commission order. (Ex. 1-237) Even prior to that time purchasers had visited their property and demanded their money back. (Exs. 3-838; 3-1429; 3-1491; 3-875; 3-964; 3-972; 3-711; 3-774; 3-627; 3-1079; 3-1090; 3-1214) Cancellations, complaints and refund demands continued through 1960. (Exs. 3-1231; 3-1262; 3-586; 3-600; 3-620; 3-1129) In July, 1961, Governor Sawyer's letter (Ex. 2-853) accused Gamble Ranch of making misrepresentations to purchasers, and as sales volume increased, the stream of complaints became a torrent. (Exs. 3-805; 834; 850; 862; 880; 887; 1256, 1259; 1335; 1400; 1428; 1447; 1470; 1493; 1502, 1564; 1572; 1586; 1644; 1675) Even the September, 1961, report of Location Analysts, an agency hired to give their recommendations concerning the promotion, advised Byrnes, Benaron, and Reisman that California officials were viewing the Gamble sales campaign with apprehension claiming it is misleading. (Ex. 2-1004)

The complaint procedure was that Rockel would obtain the facts from the purchaser and salesman and would then discuss the matter with and give his recommendation to Byrnes, Benaron, and Reisman who would make the final decision. (Rockel, 5504-5508,



5618) Examples of this policy are to be found in Exhibits 1-543; AZ; and BF. Reisman admitted that he had received complaints including those in Exhibits BF, FZ, GA, GB, GC, GD, GE, GF, GG, GH, GI. (Reisman, 13165-13189) In September, 1961, Reisman told secretary Manzin to notify him as complaints came in and thereafter they were referred to him. (Reisman, 13184-13185) Reisman also told Rockel that the moment a complaint was brought to Rockel's attention, Rockel should conduct an investigation. (Reisman, 13190) Sales Manager Stein discussed purchaser complaints of misrepresentation with Byrnes, including those shown in Exhibits 3-397; 3-1612; 3-352. (Stein, 4814-4838)

Attorney Robert McDonald was hired to represent Gamble Ranch before the Nevada Real Estate Commission, and all complaints he received he forwarded to the Gamble Ranch office. (McDonald, 7455) McBride of the Nevada Real Estate Commission furnished about 300 complaints to McDonald after January, 1962. (McBride, 6805) Previously, Byrnes furnished McDonald, for transmission to the Nevada Real Estate Commission, copies of letters from supposedly happy purchasers, but saw to it that the purchasers' names were obliterated. (Ex. 2-1266-J) McDonald was also instructed not to give the Commission secretary, McBride, a list of complaining purchasers who had been denied refunds because it would give McBride "too much ammunition." (Ex. 2-1266-C) Later, Byrnes gave instructions to send complaints to Attorney Finell. (Carey, 6257-6258; Finell, 12599-12602) Still later, Attorney Ross, a friend and associate of Reisman, was





substituted for Finell. (Carey, 6259) These attorneys received all complaints on instructions from Byrnes (Carey, 6388), and drafted letters to complainants, some of which were sent back to the company for signing by an employee, Stanley J. Weiss, who would sometimes sign them with a fictitious name. (S. Weiss, 4666-4667) Ross sent anything requiring care to Byrnes. (Ex. 1-535)

Gamble Ranch had been in trouble with the Nevada Real Estate Commission over use of Governor Sawyer's letter and other complaints in July and August, 1961, and attorney McDonald had been retained to calm things down by writing a letter to the Commission in September, 1961, stating that the company would make refunds to any persons who felt they had not been treated fairly. (Exs. 2-1266; 3-2031A) Byrnes had previously advised McDonald by letter (Ex. 2-1266-J) that buyers who were not satisfied or were unhappy with their purchase would be refunded their money in full and without qualification. (McDonald, 7481) On January 8, 1962, McDonald appeared before the Commission and his letter promising refunds to dissatisfied buyers was read into the record. (Ex. 2-1255; McBride, 6801-6802) The Commission then voted to take no action concerning the company, and a story appeared in the press indicating the company had been cleared following its promise to make refunds to dissatisfied buyers. Byrnes instructed secretary Manzin to reproduce select portions of the minutes (Ex. 1-020, 3-2038) and the news story (Ex. 1-1025) for distribution. However, publicity concerning McDonald's statement to the



Commission resulted in some refund demands by dissatisfied purchasers and Byrnes then claimed that McDonald had been misquoted and that refunds had been promised only where misrepresentations by salesmen were established. (Rockel, 5498-5500) Ross then wrote McDonald asking for a letter stating that he had told the Commission that proof of misrepresentations were a prerequisite for a refund. (Ex. 2-1266-B) Reisman's associate, Herbert Weiser, pointed out that McDonald's letter to the Commission (Ex. 2-1266) did not say misrepresentations would be required (Ex. 1-698), but Ross went ahead and told complaining purchasers that the news story was inaccurate and that it was never the company's policy to give refunds based on dissatisfaction. (Ex. 3-531) Actually, as early as August, 1959, it was company policy to give dissatisfied purchasers their money back. (Allen, 1031-1032; Ex. 3-1391) Later, Byrnes told secretary Manzin that it was company policy to refund money to customers who were not satisfied (Manzin, 5816), and Byrnes' own letter to McDonald states the same policy. (Ex. 2-1266-J) Byrnes also told Carey the same thing (Carey, 6434-6436), and Carey's letter to the Real Estate Commission (Ex. 2-186), written on instructions from Byrnes, repeated the policy. (Carey, 6300) What actually occurred was that after the refund publicity, Byrnes, Benaron and Reisman met and decided how to handle refund requests by disgruntled buyers (Weller, 5917) but they never retracted the promise made on their behalf by McDonald. (McBride, 6801-6803)

Throughout the trial, defense counsel alleged that prior to



the refund publicity of January, 1962, the company had very few cancellations, complaints or refund demands, but following that publicity there was a sharp and substantial increase in these.

(6878-6880; 10776) The defendants produced an accountant, Morris A. Landsman, who testified he prepared certain charts (Exs. CU, CV, CW) from specified records. (Landsman, 9353-9356) Landsman testified that cancellations were \$181,728 in 1960 and \$190,000 in 1961, but climbed to over a million dollars in 1962, as shown by his chart. (Ex. CU) (Landsman, 9363) Landsman also testified that there was a sharp decline in sales after the January, 1962 publicity in contrast to a comparable period in the first half of 1961, as shown by his chart. (Ex. CW) (Landsman, 9367) Landsman further testified that valid contracts had declined from a December 31, 1961 high of over 4 million, to less than 2 million as of April 30, 1965, as shown by his chart (Ex. CV) and that he used these dates at the request of defense counsel to show events before and after the adverse publicity. (Landsman, 9365-9366) Defendants had labelled the charts "before and after publicity" but the Court excised that portion. (Landsman, 10774) The Government later established that Landsman did not obtain his figures from the sources he had testified to (10794-10796; 10807-10814; 10837-10838), and that the charts actually had been prepared by defense counsel. (10835)

The Government also showed that cancellations for 1961 were over one million dollars higher than shown on chart (Exhibit CU) and far exceeded cancellations which occurred after the publicity of January, 1962. (10829-10834) The Government further established







that there was no sharp drop in sales after the January, 1962 publicity, but rather that such a drop occurred in July, 1961, and continued to the end of the year. The defense told Landsman to show only the first 6 months of that year. (10804-10806; Ex. 2-1293)

On July 16, 1962, the Real Estate Commission of California filed an "Order to Desist and Refrain" from further sales of Gamble Ranch land in California. (Ex. 1-1125) This order was accompanied by a document entitled "consent agreement", by which the parties involved waived their right to a hearing to which they were entitled prior to entry of such an order. The sales manager knew nothing about the order in advance of signing it. Byrnes just took him to the Real Estate Commission office and he learned of the order when it was handed him for signing. (Stein, 4848-4851) Byrnes also took Carey to the Commission office at the same time and Carey was made an officer for the specific purpose of signing as "President". (Carey, 6255-6256)

The Order states that the company and all persons named, agree and consent "that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 11019 of the Business and Professions Code and for the making of the Order hereinafter set forth pursuant to such section exist;" \* \* \*

The accompanying "consent agreement" contains an almost identical provision. (Ex. 1-1125) Section 11019 of the Business and Professions Code provided as follows:



"An order prohibiting the sale and lease, or either, of property in this State may be issued by the commission if the examination of the project shows that the sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees of lots or parcels in the subdivision."

No other basis for issuance of an order exists under Section 11019. (Ex. 2-1262; 12973) When publicity resulted from the Commission Order and purchasers inquired about it, Ross answered that ". . . you need not be concerned over the recent unfavorable publicity." (Ex. 3-441) Ross also advised inquiring purchasers:

"About a year ago the Real Estate Commission of the State of California and certain legislative committees took a dim view of all out of state real estate subdivisions and conducted hearings which resulted in unfavorable publicity and Gamble got more than its share of attention. \* \* \* The company voluntarily stopped selling its property to residents of the State of California under an agreement made with the Real Estate Commission in July of this year but the Company is presently planning other types of sales programs and is continuing to protect the investment of the contract buyers." (Ex. 3-418)

Ross also wrote another inquiring purchaser:

"At the first of this year, the State of California, through its Real Estate Division, took a stand



against the sale of out of state subdivisions in California, and rather than enter into litigation . . . , Gamble Ranch consented to withdraw its property from sale to California residents. This has in no way affected the continued development of the ranch. . . ." (Ex. 3-435)

However, at trial, Reisman's counsel argued that the Commission Order "trapped" the company so that it could not continue the development. (14533) Ross also stated that "there is not one word in the order issued by the real estate commissioner indicating any wrongdoing or misrepresentation by the company." (Ex. 3-436) Similar letters are to be found in Exhibits 14, 15, 41, 66 and 71.

On August 2, 1962, the California Real Estate Commission filed against the company, an "Accusation" (Ex. 1-1124) charging it and its officers, directors and stockholders, with conspiring to misrepresent Gamble Ranch land in sales to purchasers, and listing numerous representations in sales material which were fraudulent, false and untrue. (6272-6282) When purchasers inquired about the publicity resulting from the Accusation, Ross replied that

" . . . recent press releases have been inaccurate and garbled. The Company withdrew its land for sale to California residents on a voluntary basis and has not at any time been charged with fraud or misrepresentation. . . ." (Ex. 3-521) and that "No charges of fraud or misrepresentation were ever made by the Real Estate Commission." (Ex. 3-488)





Copies of Ross's letters were sent to the company office and were available there to Byrnes, Benaron and Reisman and were also available to Reisman at Ross's office, but they never protested any of the replies Ross sent to purchasers. (Carey, 6220-6228; Ross, 11590-11650)

At trial, the Government called over fifty purchaser witnesses. All of them had been impressed by and relied upon the sales materials shown to them; and upon visiting the ranch they were shocked to see that it did not resemble what had been pictured and described to them. (See Appendix D, Schedule of Purchaser Witnesses)

Also at trial, the Government proved that each representation alleged in paragraph 6 of Count One of the indictment had in fact been made to purchasers, and that each representation was false. It was also proved that material facts were concealed from purchasers as alleged in paragraph 7 of Count One of the Indictment. (See Appendix E)



## IV

### ARGUMENT

A. COMPLAINT LETTERS WERE PROPERLY RECEIVED, AND THE JURY WAS PROPERLY INSTRUCTED WITH REGARD TO THEM.

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With respect to the admission in evidence of purchaser complaint letters, appellant alleges as error that: (1) there was insufficient evidence that appellant had actual, personal knowledge of the complaint letters (Appellant's Brief, p. 19), and (2) the Court improperly instructed the jury concerning the complaint letters (Appellant's Brief, p. 26). The entire foundation upon which appellant bases these claims is Phillips v. United States, 356 F.2d 297 (9th Cir. 1965).

The Certificate attached to Appellant's Brief states that his counsel has read this Court's Rule 18, and that in his opinion the brief is in full compliance with those rules. However, paragraph 2(d) of Rule 18 provides in part:

"When the error alleged is to the charge of the Court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at trial."

Appellant complains of an error in instructions, but fails to quote: (1) the instruction given, (2) the objection he made to it at trial, or (3) any instruction he tendered which was refused. The reason for



this omission is obvious. At trial, appellant not only failed to object to the instruction given on complaints (14822-14823); he was the one who requested it [C. T. 826]. Appellants' requested instruction number 52 read as follows:

"Evidence of complaints of dissatisfied buyers of property in the Gamble Ranch has been admitted for a limited purpose only. Such evidence may not be considered by you as establishing the truth of the statements in the letters or by other evidence of complaints. Complaints are evidence only of the fact that complaints were made. Such evidence has no bearing on the question of whether the complaining persons were defrauded. This type of evidence has been admitted for your consideration only in so far as it may relate to the good faith of the defendants. It is not to be considered by you for any other purpose." [C. T. 826]

With minor editing, the Court gave the requested instruction as follows:

"Evidence of complaints of dissatisfied buyers of property in the Gamble Ranch, other than the complaints of purchasers who took the stand and testified, has been admitted for a limited purpose only. Such letter complaints may not be considered by you as establishing the truth of the statements in the letters. Letter complaints from purchasers, other than those





testifying in this case, are evidence only of the fact that complaints were made. Such evidence has no bearing on the question of whether these complaining persons were defrauded. This evidence has been admitted for your consideration only insofar as it may relate to the intent of the defendants." (14822-14823)

This is hardly the same situation as that in Phillips where there was dispute during trial over whether the defendants had actual knowledge of the complaints, defendants requested an instruction on actual knowledge, and "they made timely and adequate objection to the Court's failure to give an instruction such as they had proposed" (356 F.2d 297, 306, fn. 9). It is well-settled that appellant cannot raise as error on appeal, an instruction to which he did not object at trial. Rule 30, Federal Rules of Criminal Procedure; Hartford v. United States, 362 F.2d 63, 64 (9th Cir. 1966); Johnson v. United States, 361 F.2d 447 (9th Cir. 1966); Renteria-Medina v. United States, 346 F.2d 853 (9th Cir. 1965); Chapman v. United States, 346 F.2d 383, 389 (9th Cir. 1965), cert. denied 382 U.S. 909.

The prohibition should be even stronger where the instruction complained of was given at the request of appellant. Sherwin v. United States, 320 F.2d 137, 147 (9th Cir. 1963), cert. denied 375 U.S. 964; Bianchi v. United States, 219 F.2d 182, 194 (8th Cir. 1955), cert. denied 349 U.S. 915.



With regard to his claim that complaint letters were erroneously received in evidence, Appellants' Brief also fails to comply with the requirement of this Court's Rule 18 that "When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection . . . and refer to the page number in the printed or type-written transcript where the same may be found." Appellee has examined the transcript with regard to the offering and reception of each complaint letter and has found that appellant never objected to a complaint letter on the ground that there was a lack of evidence that Reisman had actual knowledge of the letter, or made anything remotely resembling such an objection. In order to create the impression that such an objection was made, Appellant's Brief (p. 17) quotes the remarks of another defense counsel; but these had nothing to do with complaint letters. (4443) The simple truth is that the defense never once claimed a lack of personal knowledge of the complaints, and for this reason they made no objection to their admission. Objections to evidence not raised at trial cannot be raised for the first time on appeal. Osborne v. United States, 371 F.2d 913 (9th Cir. 1967); Figueroa v. United States, 352 F.2d 589 (9th Cir. 1965); Gilbert v. United States, 307 F.2d 322, 325 (9th Cir. 1962), cert. denied 372 U.S. 969; Olender v. United States, 210 F.2d 795, 800 (9th Cir. 1954); Smith v. United States, 173 F.2d 181 (9th Cir. 1949).

In fact, the evidence that appellants had personal knowledge of complaints is overwhelming and undisputed. On November 6,



1959, Byrnes and Reisman received a Real Estate Commission Order (Ex. 1-237) advising them that their sales material and advertising was misleading, deceptive, or false in numerous specific respects and would result in fraud upon buyers. (Allen, 1001) In July, 1961, appellants received a complaint letter from Governor Sawyer (Ex. 2-1227) which warned them that their materials were untrue and misleading. A Location Analyst's report of September, 1961, advised Byrnes and Reisman that California officials viewed the sales campaign as misleading. (Ex. 2-1004) Rockel was hired as general manager of the company in February, 1961. (5323-5328) The company policy which Rockel followed concerning complaints was that Rockel would interview the complaining customer and the sales person involved and would make an initial determination which he then automatically discussed with Reisman, Benaron and Byrnes. (Rockel, 5504-5508, 5618) Reisman admitted instructing Rockel to interview each complaining purchaser and salesman involved. (Reisman, 13190) Reisman also told Secretary Manzin to notify him of complaints which came in and she did so. (Reisman, 13185) An example of one complaint letter reviewed by Reisman is found in Exhibit 3-1335 (See Appendix G). Reisman also kept in touch with Nevada attorney McDonald who was hired to represent the company before the Nevada Real Estate Commission with regard to purchaser complaints. This is illustrated by the fact that letters to McDonald regarding complaining purchasers are signed "Bert Ross for Samuel Reisman". (Exs. 2-1266-B, 2-1266-C) Byrnes was also advised of purchaser complaints of misrepresentation





(Stein 4814-4815, 4835-4838) and kept in touch with Attorney McDonald about complaining purchasers. (Ex. 2-1266-D; 2-1266-C)

When the refund publicity occurred in January, 1962, Byrnes, Reisman and Benaron met and decided how they would handle complaining purchasers and their refund requests. (Weller, 5917) Byrnes then approached attorney Finell who handled the complaints for two to four weeks to establish a pattern. Thereafter Finell told Byrnes that the company could handle them itself (Finell, 12599-12602), and secretary Manzin handled them under instructions from Byrnes. (Manzin, 5806) Later, Byrnes and Benaron hired attorney Ross to answer complaint letters. (Carey, 6259) That Ross kept Reisman advised of complaints is amply illustrated by the fact that letters relating to complaining purchaser lawsuits against the company were signed by Ross "for Reisman" on Reisman's stationery (Exs. 1-545, 1-578), Ross advised Reisman in writing of refunds made, pending, and denied (Ex. EO), and a Ross letter states that Reisman made an agreement on a refund if a complaint were made. (Ex. 3-2012) Copies of Ross' letters to complaining purchasers were available to Reisman in Ross' office, and were available to Byrnes in the company office. Ross' letters to complainants contained information which he obtained from Byrnes. (Ross, 11650) Obviously, Reisman was aware of the complaints made in 1962, for he testified on his own behalf that after the refund publicity, "the Company received a flood of complaints," which were turned over for handling to Finell and later to Ross.



(Reisman, 13320)

The foregoing brief summary of appellants' actual knowledge of complaints presents a far different situation than that in Phillips v. United States, 356 F.2d 297 (9th Cir. 1965), where this Court noted that "At the trial the Government did not contend that any of the defendants had actual knowledge of any of the letters and requests. . . ." (p. 306) Appellant Reisman appears to be arguing that only complaints which he read should be admissible against him. This is tantamount to a request that this Court create a sanctuary for principals in fraud cases which would permit incrimination of underlings but shield the superiors who supervise and direct them.

Another clear difference between Phillips and this case is that in Phillips, the complaint letters were received solely for the purpose of showing intent to defraud. In this case, the complaints were admissible for several other purposes, and evidence admissible for one purpose is not excludable even if inadmissible for another purpose. United States v. Vandersee, 279 F.2d 176, 180 (3rd Cir. 1960). In addition to their relevance to appellants' intent, the complaint letters were also admissible as the documents in response to which lulling letters were sent. Paragraph 9 of the indictment charged the defendants with causing lulling letters to be sent to purchasers "for the purpose of allaying said purchasers' suspicions and fears that they had been defrauded. . . ." [C.T. 9]. The complaints were offered and received for this purpose also. (6334-6335) Obviously, they were properly so admitted, because



the jury would have no way to tell if a company letter constituted an attempt to "lull" a purchaser without examining the purchaser's letter which prompted the company's reply. In other words, an attempt to lull would be apparent from: (1) a purchaser complaint of misrepresentation as to the availability of water answered by the statement that the company has been successful in every well drilled (Ex. 3-429); or (2) a complaint over unfavorable publicity answered by the statement that the purchaser need not be concerned about it (Ex. 3-483); or (3) complaints over lack of development answered by statements that the company has made "vast improvement" and spent "many hundreds of thousands of dollars". (Exs. 3-457; 3-432; 12)

A further purpose for the admission of the complaints was to rebut the defense contention that virtually all complaints were made after January, 1962 and were prompted by adverse publicity rather than purchaser discovery of misrepresentation. The defense accused the Nevada Real Estate Commission of causing the refund publicity of January, 1962 (6878) and the California Commission of causing later unfavorable publicity. (14026) The defense produced accountant Landsman with charts to depict their contention in graphic form. (9353 ff) Reisman testified that "After the situation arose in January of 1962 when this publicity came about, as a result of Mr. McBrides' efforts . . . the Company received a flood of complaints. It was like a run on the bank." (13320) The defense argued to the jury that every complaint file had been examined and only ten complaints had been made prior to January, 1962.







(14634) Under these circumstances, the complaints were relevant to show when they occurred, and the Government used them in this manner. (14745-14747)

The complaint, cancellation, and refund files of the company contain a large volume of material prepared in response to purchaser indications of dissatisfaction. This material was prepared according to company policy established by appellants and their co-defendants, and carried out under their supervision. The company response varied depending on the type of complaint made. These acts and declarations of the co-conspirators during the course and in furtherance of the conspiracy are attributable to all of them. Phillips v. United States, 356 F.2d 297, 303 (9th Cir. 1965); Pinkerton v. United States, 328 U.S. 640; Carbo v. United States, 314 F.2d 718, 735 (9th Cir. 1963). Upon all of the foregoing grounds, the complaint letters of purchasers were properly received.

Reisman stresses his status as an attorney and appears to hope for a reversal of his conviction because the convictions of attorneys for mail fraud in the sale of land were reversed by this Court in Phillips v. United States, 356 F.2d 297 (9th Cir. 1965), and Windsor v. United States, \_\_\_\_ F.2d \_\_\_\_ (9th Cir. 1967). However, it should be pointed out that in no way was his role in the promotion limited to that of attorney. As was said in Benjamin v. United States, 328 F.2d 854, 863 (2nd Cir. 1964), cert. denied Howard v. United States, 377 U.S. 953, members of appellant's ancient profession should not "be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was



plainly to be seen. . . ."

B. NO EVIDENCE WAS SUPPRESSED AT TRIAL.

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1. Appellants Were Not Entitled to Witness Questionnaires.

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In pretrial proceedings, the defense requested the questionnaires which the Government had sent to and received from purchasers. (264) The Court declined to order their production because a completed questionnaire was "a statement of the witness." (265) This was undoubtedly correct in view of the following provision of Title 18, United States Code, Section 3500:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

The purpose of this statute was to restrict the use of such statements to impeachment of the witness after he testifies on direct examination. Palermo v. United States, 360 U.S. 343 (1959). Statements of a government witness or prospective witness which are not producible under this section are not obtainable at all.



Peek v. United States, 321 F.2d 934 (9th Cir. 1963).

Apparently realizing that he was not entitled to questionnaires of prospective government witnesses under the so-called Jencks Act, appellant claims that they constitute evidence favorable to the accused which the Government suppressed in violation of the principle enunciated in Brady v. Maryland, 373 U.S. 83 (1963). Actually, prior to January 8, 1965, the Gamble Ranch files, including all files of purchasers whose contracts were cancelled, were made fully available to the defense, (217-237) and these files disclose the names and addresses of such purchasers. (Exs. 3-296 through 3-1770) The files of purchasers who were still paying on their contracts were left at the Holly Corporation. (9414-9415) The defense obviously knew this, for they so informed the Court (9414) and obtained such files from Holly without the knowledge of the Government. (9619-9637) These files also showed the names and addresses of purchasers. (Exs. CY; CZ; DA; CX; CT; DP; DQ; DR; DS; DT) Thus, in the above groups of files, appellants had a full list of all purchasers' names and addresses. They could have contacted any or all of them to determine if the purchasers were satisfied or believed they had been defrauded. In fact, a defense investigator did have access to and obtain files from Holly. (9656-9663) In addition, the company had previously hired another private investigator to complete questionnaires on each purchaser, which questionnaires were turned over to defense counsel. (6432-6433) Under these conditions there could have been no suppression of evidence. United States ex rel. Thompson v. Dye, 221 F.2d 763





(3rd Cir. 1955), cert. denied 350 U.S. 875. Appellant's real complaint seems to stem from his inability to find more satisfied buyers. (Appellant's Brief, p. 46) In any event, the Government showed that company materials misrepresented the land even to appellant's "satisfied" buyers, and that these buyers merely did not believe or rely upon the company's representations. (Sekiguchi, 9405-9435; Craig, 9500-9530; Jackson 9691-9692; Rengler, 9746-9749; Froman, 9796A; Boylan, 9814-9829; Currie, 9895-9896; Garrick, 9955-9976; Fearing, 11865; Templeman, 11878-11920) Furthermore, that there were some "satisfied" purchasers would not exculpate appellants since there is no requirement that every purchaser, or any purchaser, be deceived. Lemon v. United States, 278 F.2d 369 (9th Cir. 1960); Blue v. United States, 138 F.2d 351 (6th Cir. 1943).

2. Appellants Were Not Entitled to  
Real Estate Commission Investiga-  
tive Files.

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Some background is necessary to show the context of the defense demand for all files of the California Real Estate Commission concerning Gamble Ranch. During the Government's case, Henry Block, who had been Deputy Real Estate Commissioner in the Los Angeles office during 1959-1962, was called (7038) and testified to the following carefully limited areas: (1) Commission procedures in issuing a public report and Block's contacts with Gamble Ranch in this regard (7039-7060), and (2) that the Commission did not



approve Gamble Ranch advertising and was not shown most of it.

(7061-7065) Thereafter, on cross-examination, the defense attacked Block for failing to stop Gamble from selling fraudulently, and asked of Block such questions as:

You had authority to stop Gamble sales at any time? (7124)

Why didn't you examine Gamble advertising? (7082)

Why didn't you call for all Gamble brochures? (7120)

Why didn't you investigate the background of Benaron?

(7106)

You could have stopped Gamble sales in January, 1962?

(7123)

When did you begin to investigate Gamble Ranch? (7111)

You withheld facts about your investigation from Reisman?

(7132)

After further, extensive cross-examination, the defense asked for "the investigative records" of the Real Estate Commission and for the first time (7164) mentioned a subpoena (C. T. 907) they had served on the Commission calling for "All files concerning the Gamble Ranch . . . ." (C. T. 908) The Court deferred the matter to a later time. (7168)

Then, the Government called Real Estate Commission Appraiser George Poppe (7202) and carefully limited his testimony to: (1) An inspection trip he made to Gamble Ranch in March, 1962 (7203-7209) and (2) a meeting between Commission personnel and Gamble representatives on June 8, 1962. (7209-7229) During



cross-examination, the defense told the Court that "we are going to be calling upon you to permit us to examine the entire investigation file of the Real Estate Division." (7232)

The Real Estate Commission had moved to quash the subpoena served upon it (C. T. 894) and after this motion was argued (8782-8789), the Court stated "Now, I think the subpoena is too broad and I think, outside of the specific documents, it has to be more specific and there has to be a showing that these documents are of evidentiary nature" (8789), and quashed the subpoena. (8792) The defense immediately served a new subpoena on the Commission. (8792) Appellant has failed to secure inclusion of this subpoena in the record on appeal, but the Court characterized it as "very general" (8922) and as calling for non-evidentiary matter (8792-8793), and Appellant's Brief (pp. 43, 45) still insists he was entitled to all "the investigative files of the Division of Real Estate of the State of California." (Appellant's Brief, p. 43) The Court ordered some records turned over to the defense, but said it was not pursuant to their subpoena. (8921-8922) The Court ordered that the remaining records be marked for identification and sealed pending possible appeal. (8920) This was done. (Exs. 2-1301-A; 2-1301-B, and 2-1301-C)

The subpoena in question was issued under the provisions of Rule 17(c) of the Federal Rules of Criminal Procedure. Rule 17(c) does not permit a carte blanche inspection or "fishing expedition," and is not a discovery provision. It applies only to evidentiary material which would be admissible in evidence at trial. Bowman





Dairy Co. v. United States, 341 U.S. 214, 220-221 (1950); United States v. Maloney, 37 F.R.D. 441 (W.D. Pa. 1965); United States v. Rothman, 179 F. Supp. 935 (W.D. Pa. 1959). After testimony of a Government witness on direct examination, production of records which become evidentiary for the purpose of impeachment is governed by the provisions of 18 U.S.C. 3500. United States v. Maloney, 37 F.R.D. 441 (W.D. Pa. 1965). Statements of persons not called as government witnesses may not be used to impeach and therefore cannot be reached by a subpoena under Rule 17(c). United States v. Echeles, 222 F.2d 144, 152 (7th Cir. 1955).

Appellant now claims that the records he subpoenaed would be material to show: (1) that the Real Estate Commission reviewed Gamble advertising and (2) that there was correlation between the Commission's fraud investigation of Gamble and its issuance of public reports to Gamble, contrary to the testimony of Commission witnesses Block and Poppe. (Appellant's Brief, pp. 62-69) However the contrary testimony of Block and Poppe was elicited on defense cross-examination and relates to collateral issues. Therefore, impeachment by independent evidence is not permissible. McKune v. United States, 296 Fed. 480 (9th Cir. 1924). Furthermore, appellant never limited his request to records usable for such a purpose, but continued to stand on his fatally broad subpoena demanding all investigative files. Nor has appellant ever shown that there is any such evidentiary material in the files. His best attempt is the plaintive assertion that "surely there is something in their files which would have been useful to the defense in cross-



examining them." (Appellant's Brief, p. 69)

Apparently to bolster the claim that the prosecution "suppressed evidence," appellant states that the prosecutor had file cabinets marked "closed" and would not discuss their contents (Appellant's Brief, p. 56), and that the prosecutor stated with regard to boxes of records withheld from the defense: "But the contents you will never know what is in it." (Appellant's Brief, p. 55) Actually, the above quote was made by the Government to the Court in the course of a Government request that a box full of Real Estate Commission files furnished to the defense be individually marked for identification. The context was as follows:

"THE COURT: You say everything marked in the box?

"MR. NISSEN: They have a box full of material that they took from the Real Estate Commission files.

"THE COURT: The box can be marked for identification.

"MR. NISSEN: But the contents, you will never know what is in it.

"THE COURT: They will have to be marked . . . ."

(8922)

Appellant's misleading representation as to what occurred at trial on the above matter demonstrates his unwillingness to have this Court decide his case on the basis of what actually happened, and is typical of many other distortions in his brief.



C.      THERE WAS NO MISCONDUCT BY  
         THE PROSECUTOR.

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The trial transcript makes it clear that, whether as an attempt to intimidate the prosecutor or for some other purpose, appellants and their co-defendants chose to defend themselves by making accusations against the Government. During the testimony of the fourth witness, counsel for Reisman and Benaron accused the prosecution of intimidating and threatening Beatie. (1542-1548) Thereafter, the following occurred:

"THE COURT: What is your position, Mr. Nissen?

"MR. NISSEN: If Mr. Beatie testified on the witness stand that the Government has intimidated him or led him to give testimony that wasn't true or that wasn't fair, it would be proper cross-examination of the defendants to show his testimony for the Government was not accurate. If it does not come out before the jury, it has no relevance whatsoever.

"THE COURT: That is right. You can ask him on cross-examination.

"MR. ROTHMAN: We will be guided accordingly, if your Honor please." (1544)

The good faith of the defendants in making this most serious charge can be judged from the fact that they made no attempt





whatsoever to substantiate it by evidence. Appellant states that "The examples of misconduct by the prosecutor presented here are only a few of the many that took place during the trial." (Appellant's Brief, p. 113) The court may be sure that any instance of genuine misconduct would be fully exploited by appellant on this appeal. The fact that "many" other accusations of misconduct were made but are not urged as error on appeal merely indicates their baseless nature. An example of such accusations is the following which occurred during Government cross-examination of defendant Byrnes:

"Q. Isn't it a fact that the so-called confidential report --

"MR. HUNT: I object to that, 'this so-called'. That is Mr. Nissen's designation of this report.

"THE COURT: Mr. Nissen, refer to what it is.

"MR. NISSEN: I hadn't finished the question.

"MR. HUNT: Your Honor, the first two or three words were enough.

"THE COURT: Just refer to what it is.

"MR. NISSEN: I had not finished the question. I think maybe -- I withdraw the two words 'so-called'.

"THE COURT: Begin over again.

"MR. NISSEN: Let's put it in quotes.

"Q. This 'confidential report to shareholder, ' Mr. Byrnes --

"MR. HUNT: I object to that also, your



Honor please. I think this is misconduct on the part of the prosecutor.

"THE COURT: Is there a title on the document?

"MR. NISSEN: It says, 'Confidential Report to Stockholders. '

"THE COURT: It does say 'Confidential Report?'

"MR. NISSEN: Yes, sir. I am quoting it directly.

"THE COURT: All right. Go ahead. "

(12782-12783)

Also, in attempting to show misconduct, Appellant's Brief (p. 120) states that "the Court twice interrupted the prosecutor during the reading of that particular letter and warned the prosecutor . . . ." Thereafter, appellant purports to quote the two interruptions, but gives only the italicized portion of the following quote and omits the rest:

"THE COURT: I will have to interrupt you,  
Mr. Nissen.

"MR. NISSEN: All right, sir.

"THE COURT: We will take our noon recess now, ladies and gentlemen." (6363)

Thus appellant translates an interruption for a lunch recess into an instance of misconduct.

During a noon recess on June 10, 1965, appellant Reisman told the prosecutor that Reisman was going to have the Bar Association investigate the prosecutor for his "misconduct" at the trial.



(Reisman, 13820)

Defense attacks and accusations against the Government continued through the final argument, in which the prosecutor was referred to as "vicious", "unfair", "despicable", and guilty of "foul play". (14625-14640)

Appellant's characterization of the trial as marked by "numerous acts of the prosecutor's misconduct . . . which . . . deprived appellant of his right to a fair trial" (Appellant's Brief, p. 79) is thoroughly dispelled by even a cursory reading of the trial transcript. The trial judge carefully limited the Government in its evidence and manner of presentation, and gave the defendants the widest latitude in making their defense. Never once did the Court find an instance of misconduct for which to censure the prosecution.

1.       The California Real Estate Commission Order to Desist and Refrain Was Properly Received in Evidence.

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It is significant that appellant's attempt to establish that acts of "misconduct" were "numerous" has led him to brand as "misconduct" alleged errors of every kind, including the admission of an exhibit into evidence and the prosecutor's offer and use of the exhibit. (Appellant's Brief, pp. 81-94)

In the fourteen pages appellant devotes to the Real Estate Commission Order, he nowhere finds room to advise this Court of when, where, and under what circumstances the exhibit was





offered and received. This is in spite of Rule 18(2)(d) of this Court which provides:

"When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or type-written transcript where the same may be found."

The reason for this omission is obvious. When the Order to Desist and Refrain (Ex. 1-1125) was offered and received, the defense made no objection to it whatever. (6267-6272; 6283) In fact, the defense asked the Government to read the Order to the jury (6276) and were willing to stipulate that there was such an order and that they knew of it. (6289-6291) Appellant should not be allowed to raise for the first time on this appeal a matter which he did not object to and thus did not give the trial court an opportunity to rule on. Smith v. United States, 173 F.2d 181 (9th Cir. 1949).

In any event, appellant's argument concerning the Order is entirely fallacious for the following reasons: First, the Order is not an "offer in compromise" or "settlement" as appellant characterizes it. It is an Order to Desist and Refrain. The Order is accompanied by a separate "Consent Agreement" by which the signers waive their right to a hearing and agree that all facts required for entry of the Order exist. That this is so in no way transforms the Order into an "offer in compromise". Second, neither the Order nor the Consent Agreement were offered or



received as an admission of fraud by the defendants as appellant claims. (Appellant's Brief, p. 83) The facts are as follows: The Commission Order was filed on July 16, 1962, and the signers consented "that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 11019 of the Business and Professions Code and for the making of the Order hereinafter set forth pursuant to such section exist; \* \* \* " (Ex. 1-1125) Section 11019 of the Business and Professions Code furnished the following basis for such an Order:

"An order prohibiting the sale and lease, or either, of property in this State may be issued by the Commissioner if the examination of the project shows that the sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees of lots or parcels in the subdivision. " (emphasis added; (Ex. 2-1262)

When purchasers inquired about the Order, Ross replied that: "You need not be concerned over the recent unfavorable publicity" (Ex. 3-441), the Order "has in no way affected the continued development of the ranch" (Exs. 14; 3-435), "there is not one word in the order issued by the real estate commissioner indicating any wrongdoing or misrepresentation by the company" (Exs. 15; 3-436), "the Order contains no admission of fraud or wrongdoing." (Ex. 17), and that "the company withdrew its land for sale to California residents on a voluntary basis and has not at any time been charged



with fraud or misrepresentations." (Exs. 39; 66; 3-521)

Paragraph 6K of the Indictment (C. T. 8), charged that the statements quoted above from Exhibits 14, 15, 17, 39 and 66 were false and fraudulent representations, and Paragraph 9 of the Indictment (C. T. 9) charged that defendants caused letters to be sent to purchasers to explain away unfavorable publicity.

The issue raised by the Indictment was whether or not the Order contained "one word . . . indicating any wrongdoing or misrepresentation by the company," or any "admission of fraud or wrongdoing." There was no way for the jury to determine this apart from the Order itself. The Government merely offered the Order as evidence and showed that it was agreed that all grounds required for such an Order existed, and the only grounds were misrepresentation, deceit, or fraud. (Ex. 2-1262) Several weeks later in the trial the defense produced attorneys whose testimony tended to show that the Consent Agreement was not meant to be taken as an admission of fraud. However, the jury was not required to believe the testimony. Taylor v. United States, 320 F.2d 843 (9th Cir. 1963), cert. denied 376 U.S. 916 (1963). If the jury did believe them, the Order could not have harmed defendants in any way. However, Ross's justification of his statement that no admissions of wrongdoing had been made is enlightening:

"A. [ROSS] They technically consented there was jurisdiction to make the order, but there is nothing in the document itself in which they make any admissions.

"Q. In other words, they don't say, 'we





admit to fraud and misrepresentation?'

"A. That is correct." (11478)

Attorney Finell justified his interpretation of the Order as not constituting an admission of wrongdoing on the basis that the Order relates only to future sales and thus admits nothing with regard to past transactions. (12636)

In argument, the Government carefully limited its remarks concerning the Order to the issue of whether the Ross representations contained in it were false:

" . . . Mr. Ross' letter to a purchaser, mailing Count Fifteen. 'There is not one word in the order issued by the Real Estate Commissioner indicating any wrongdoing or misrepresentation by the company.' All right. The attorneys told you in their opinion there was not. I am not a witness and I will not give you my opinion. Just look at it once and see."  
(14381-14382)

In rebuttal argument the Government also said:

"Then they talk an awful lot about this stop order in 1962, and how dare the Government say that was an admission of fraud. Read the indictment and it says they told purchasers it gave them [no] indication of wrongdoing. You use your own judgment whether you think that stop order gives any indication of wrongdoing." (14780-14781)



Appellant's entire argument about the Order boils down to the legally unsupported contention that the Government should not have been allowed to prove an allegation of misrepresentation contained in the Indictment.

2. Clejan Was Properly Questioned  
and Impeached.

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Arnold Clejan, a defendant who had already been convicted and sentenced (C. T. 657), was called as a Government witness and immediately showed his reluctance to testify. (4393-4397) At a bench conference, the Government then advised the Court that the prosecutor had previously interviewed Clejan at which time Clejan told of a warning he gave Byrnes and Benaron against hiring Escarzaga -- a matter which Clejan now claimed he could not recall. With regard to other conversations with Clejan, the prosecutor informed the Court:

" . . . on the second meeting he said to me, 'Look, I have got nothing against these people and I don't want to hurt them.' I told him, 'I don't care what you want, you tell the truth.' His attorney called me thereafter -- \* \* \* Mr. Schwartz said to me in effect, 'Mr. Nissen, I don't know if you are aware of it but Mr. Clejan is personally hostile to you.' I said, 'Why?' He said, 'Because of the statements that you made at the time he was sentenced. He



says he will not testify as he told you in the office  
because he is hostile to you. ' ' (4399-4400)

Thereafter, the Government asked permission to treat Clejan as an adverse witness and proceed by leading questions. (4400) Appellants' counsel objected and in keeping with his standard practice, made an accusation that the Government's statement to Clejan quoted above "is in the nature of a veiled threat to the witness by the Government. . . ." (4402) Appellant's objection was overruled (4403) and the Government proceeded by leading questions strictly limited to two events: (1) Clejan's warning to Byrnes and Benaron against hiring Escarzaga (4403-4410), and (2) Governor Sawyer's protest of the use of his letter in October, 1959, and Clejan's conversation with Benaron, Byrnes, and Reisman shortly afterward. (4410-4414) The Government then told the Court that "for the reason explained, your Honor, up at the bench, I am going to discontinue questioning and I am going to just identify some documents." (4414)

During "cross-examination" of Clejan who was friendly (4513-4514) to them, the defense, over Government objection (4452-4461) went into the whole history of Clejan's involvement with the ranch. (4452-4554) In the course of this Clejan testified by leading questions that he never told Benaron and Byrnes that the Governor forbade the use of his letter, but only that it could not be reproduced in brochures in the future. (4487) Clejan was also led to testify that the Ranch Land company in Chicago bought a block of land and resold it in Chicago as an independent broker, not as an agent of





Gamble Ranch. (4491-4495) In an apparent effort to convince the jury that Clejan was a friend of the Government and an enemy of the defendants, the defense implied that a Government car had been made available to chauffeur him (4499) and told the jury that the Government had improperly attempted to limit defense cross-examination of Clejan. (4501) The defense also elicited the fact that Clejan was suing Reisman (4495), and accused Clejan of concealing from defendants the fact that he had "been denied a discharge in bankruptcy because of fraud." (4519)

Before beginning "re-direct" examination of the hostile Clejan, the Government told the Court at the bench that "with respect to Clejan's testimony on cross-examination the Government is claiming surprise with respect to two points. . . ." which were (1) that the Governor did not demand discontinuance of his letter and Clejan never so advised the defendants, and (2) the Ranch Land Company bought the land and resold it themselves. (4455-4456) The Government said it intended to impeach Clejan on these matters. (4557)

On re-direct examination, Clejan denied telling postal inspector Jacobson that the Governor had told him not to use his letter further in the promotion, and that Clejan had so advised the defendants. (4566-4571) Clejan did admit that Ranch Land Company never paid Gamble Ranch until after Ranch Land had sold it to someone. (4573)

The Court then allowed the Government to ask Clejan if he had told his attorney to advise the prosecution that Clejan was



hostile to the prosecutor on the ground that it was for the purpose of impeaching Clejan by showing bias against the Government.

(4575-4576) Subsequently, the Government attempted to impeach Clejan by asking: "And have you been convicted of a felony, sir?" (4579), the question of which appellant now complains, and which appellant misquotes as "and you have been convicted of a felony, sir?" (Appellant's Brief, p. 96)

The defense objected to the question (4579), it was never answered (4585), and the Court instructed the jury to disregard and draw no inference from it. (4590) The Government claimed the right to impeach Clejan regarding his statement about the Governor's letter which exculpated the defendants, and pointed out that there were approximately a dozen methods of impeaching witnesses, including: (1) prior inconsistent statements - which the Government had not yet proved; (2) bias or hostility, and (3) conviction of a felony. (4584) After written points and authorities were filed, the Court decided not to allow the question on the ground that the answer would be of small benefit to the Government. (9473-9474) Prior inconsistent statements of Clejan were proved, however (4615-4618), and appellant now makes no claim that this was error.

It is noteworthy that appellant does not claim that Clejan was not subject to impeachment, but complains only of the means used by the Government. Obviously, Clejan's testimony about the Governor's letter which exculpated the defendants and was directly contrary to testimony of witness Allen (993-994), established the required surprise and prejudice under this Court's decision in



Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965), to entitle the Government to impeach him. Once impeachment becomes appropriate, it can be accomplished by any recognized method, including proof of a felony conviction. United States v. Vasquez, 319 F.2d 381, 386 (3rd Cir. 1963); Meeks v. United States, 179 F.2d 319 (9th Cir. 1950).

Appellant asserts that the prosecutor's question made sure "that the jury knew that Clejan had been convicted" as a co-defendant in the same case. (Appellant's Brief, p. 100) The question itself implies nothing of the sort, and the defense obviously recognized this because during discussion over it, a defense counsel informed the Court that he would not question Clejan about his indictment if that would open the door for the Government to inquire about his conviction. (4586-4589) Even if the contrary were true, there is no inherent prejudice in the jury being told of the conviction of co-defendants. Davenport v. United States, 260 F.2d 591 (9th Cir. 1958) (mail fraud); Wood v. United States, 279 F.2d 359 (8th Cir. 1960) (mail fraud).

Appellant accuses the prosecutor of choosing "a devious method for disclosing Clejan's conviction to the jury." (Appellant's Brief, p. 101) Actually, the Government could have properly disclosed Clejan's conviction on his direct examination. United States v. Jannsen, 339 F.2d 916, 919 (7th Cir. 1964); United States v. Freeman, 302 F.2d 347 (2nd Cir. 1962); United States v. Murray, 297 F.2d 812 (2nd Cir. 1962); United States v. Aronson, 319 F.2d 48, 51 (2nd Cir. 1963). In addition, the prosecution could





have introduced extensive evidence of the convictions of all co-defendants. This came about because the defense introduced a chart (Ex. CV) which purported to show that valid Gamble Ranch contracts declined from a high of \$4,281,286.00 on December 31, 1961, prior to adverse publicity, to a low of \$1,185,000.00 on April 30, 1965, after unfavorable publicity. (Landsman, 10766-10774) Defense counsel claimed that the publicity to which the chart referred was the refund publicity of January, 1962 (10777) and the cease and desist order of July, 1962. (10779-10780) Without any prompting from anyone, the Government voluntarily informed the defense that because the chart showed the decline of contracts from publicity through April, 1965, the Government would be entitled to show that there was adverse publicity which contributed to the contract decline after that of 1962, including that occurring when the co-defendants were convicted and sentenced. (10774-10780) The Government made no objection when, after this warning, the defense withdrew the chart, and the prosecution did not seek to show the later publicity (10789-B to 10790), even though, as the Court told the defense: "You have it in evidence this was before and after publicity. You were very careful to get that in and you are relying on it. That is the only reason you made those charts, isn't it -- . . . is to argue that it was this adverse publicity in '62 that caused this." (10787) Appellant's claim that the prosecution was determined to strike an "intentional foul blow" (Appellant's Brief, p. 101) by disclosing Clejan's conviction is hardly credible in view of the fact that the Government had the opportunity to



disclose the convictions of all the co-defendants but in deference to the defense voluntarily relinquished that opportunity.

3. Government Cross-Examination of  
Witness Roche Was Proper.

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Advertiser John Roche was called as a defense witness and testified that a blue brochure (Ex. 2-121) was reviewed by attorney Albert Allen (14,238), rather than by Reisman as indicated by the Government's witnesses.

On cross-examination, the Government asked Roche:

"Sir, some of your advertising has previously been involved in mail fraud cases, has it not?" (14,242)

Appellant now claims that "the prosecutor insinuated, contrary to fact, that the witness had been guilty of mail fraud" (Appellant's Brief, p. 102) and that the jury "could believe that . . . Roche had been a defendant or even been convicted." (Appellant's Brief, p. 106) No such insinuation was ever made and there is no basis for such a claim apart from appellant's fertile imagination.

4. Cross-Examination of Appellant  
Reisman Was Proper.

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The Government never accused appellant of tampering with evidence and appellant's assertion to the contrary is outright



distortion, as a reading of the transcript shows. (13713-13720) Reisman was belligerent and evasive and the questions asked were necessary to obtain an answer. When the defense claimed that the Government intended to infer that Reisman must have removed something from the file, the Court who heard the matter impartially, said: "I didn't get that inference", (13720) and even counsel for a co-defendant said he didn't know if counsel intended to infer that or not. (13719) Outside the presence of the jury, the Government did inform the Court that someone other than the prosecution had removed a letter from another file. (13792-13793)

The Government pointed out to the jury several false statements made by Reisman, but never accused him of perjury in the instance of which appellant complains. The record itself adequately refutes his contention. (13394-13396)

The Government did not bring incompetent evidence before the jury. Appellant claims that, by advising the Court that a picture about which Reisman was being questioned came from a company sales kit in evidence, the prosecution was attacking Reisman as to conduct not resulting in a felony conviction and attempting to convict him of being a no good dissolute person. The trial proceedings refute this ridiculous claim. (13597-13598) This is another excellent illustration of how far appellant must go in attempting to establish his claim of "numerous" acts of misconduct.





5. The Prosecution Accused No One  
of Tampering With Evidence.

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Appellant is very careful not to quote from the record concerning what was said about the admissibility of records from the Holly Corporation. The account given in Appellant's Brief (pp. 113-119) bears no resemblance whatever to which actually transpired. In the course of questioning a defense purchaser witness by appellant's counsel, the following occurred:

"Q. MR. HUNT: I have another file. I will ask you if you recognize this paper in this file as a copy of the Agreement of Purchase that you signed?

"A. As far as I can tell it is.

"Q. And also if you recognize this as the deposit receipt you signed?

"A. Yes.

"Q. I ask you if you recognize this as a copy of the Public Report and if your signature appears on the Public Report?

"A. It does. \* \* \*

"MR. HUNT: I would offer this file, your Honor, as the exhibit next in order. \* \* \*  
(Ex. CY)

"MR. NISSEN: There is no foundation for that whatsoever. The witness says he recognized his signature on three documents.



"THE COURT: What file is this? Is this a Gamble Ranch file?

"MR. HUNT: This is a file obtained pursuant to subpoena from the Holly Corporation, your Honor.

"MR. NISSEN: There is not a shred of evidence of that fact in the record, your Honor, not one."

(9394-9395)

The Government then established on voire dire examination of the witness that he had no idea where the documents came from and that they were not in the same condition as when he signed them. (9395-9397) Thereafter, the following occurred:

"MR. NISSEN: All we are asking is that counsel authenticate the file so we will know where it comes from.

"MR. HUNT: Well, your Honor, I am amazed, but I am sure there is only one thing that I can gather from the questions of Mr. Nissen or the remarks about it, and that is, he doesn't believe we are submitting authentic evidence." (9400)

The Court allowed the defense to introduce the documents contrary to the requirement that they must first be authenticated as to where they come from by the custodian. (9400) Lipscomb v. United States, 33 F.2d 33 (8th Cir. 1929).

The Government said:



" . . . we would just like to have somebody come over and state 'These files are in the same condition they were when we turned them over.' I think we are entitled to that",

and the defense promised to do so the next trial day (Tuesday).

The Court said to the defense:

"You had better have him in Tuesday so we won't have any problem, and then it is cleared up." (9415)

The next trial day, the defense produced Holly employee James F. Ragan who testified that he had been custodian of certain Gamble Ranch files until a few days earlier. (9619) Ragan also said that the files now contained ledger sheets which were kept separately when they were in his custody. (9620) Ragan stated that the Grand Jury foreman had instructed him not to release any records without first consulting the Postal Inspector or the United States Attorney. (9634) Ragan recalled that Gamble ledgers called for by a Government subpoena could not be found, but he did not know how they came into the defendants' possession. (9634-9636) With regard to the Gamble Ranch files, Ragan said they were turned over to a defense process server by Ragan's subordinate by mistake and should have been produced in court instead. (9636-9637) The Government then showed Ragan the files in question and asked.

"Q. . . . In other words, before these were turned over, the files, you did not inventory them to





see what correspondence was in them?

"A. I personally did not. \* \* \*

"Q. . . . By looking at the file you can recognize things that are usually in your files, but you cannot state, can you sir, that there is something removed, for instance, a letter from a purchaser?

"A. No, I can't say that." (9638)

A short time later, defense counsel Rothman addressed the Court in front of the jury as follows:

"MR. ROTHMAN: Your Honor please, I want the record to reflect something which I don't think Mr. Hunt has the temperament to talk about. But there sits a gentleman who has the highest honors that the State Bar can bestow upon him. He is a member of the Board of Governors of the State Bar, and here an attorney is suggesting that we have tampered with those documents, and I resent it.

"MR. NISSEN: Counsel may resent it. Nothing at all was said by the Government. We know Mr. Hunt and Mr. Rothman do not tamper with files.

"We don't know what happened to them when they were let loose against the Grand Jury orders to a process server without any explanation, and the next thing we know they are showing up in court. We



would like to know.

\* \* \*

"THE COURT: They are entitled to know what happened to records, if they were turned over to a process server and the link. Then you will have to connect that link. (9650)

\* \* \*

"I don't think Mr. Nissen -- he has said and I am sure he is not inferring in any way any counsel here took anything out of those files. But he is still entitled to have the files brought down to date, their custody and whether or not there were any changes made in them. We all know that. That is just . . . routine foundational proof." (9650)

The foregoing is the basis upon which Appellant bases his charge that "the prosecutor insinuated without basis in the record that appellant, his counsel or counsel's investigator tampered with evidence." (Appellant's Brief, p. 113) It is obvious that appellant's outrage stems not from any accusation that he tampered with evidence, but from the fact that the rules of evidence were applied to him and his honored counsel as well as to the Government. Even in argument to the jury, the defense accused the Government of questioning the integrity of counsel Hunt, a member of the Board of Governors of the State Bar, as a result of the above episode. (14565) This is merely another illustration of the defense tactic of



constantly attacking the prosecution.

6. The Prosecution Did Not Attempt  
to Incite Passion or Prejudice in  
the Jury.

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Appellant claims that "large portions of the complaint letters . . . should have been excised," and that "irrelevant matter was paraded before the jury -- and in an artful manner," to produce the desired effect of inciting in the jury, passion and prejudice against appellant and sympathy for the victims. (Appellant's Brief, p. 120)

The first quotation relied on by appellant is from Exhibit 3-459, from which appellant quotes only the italicized portion of the paragraph below:

"We bought this ranch so we could live there  
when we retire in two years. We were told by the  
agent who sold us the land that there would be a  
shopping center and now according to the clippings  
we have from the newspaper we feel that we were  
misled." (6357)

How the reading of that letter would incite passion, prejudice, or sympathy, appellant does not explain.

The only other quotation complained of by appellant was read from Exhibit 3-488 (See Appendix F). The reading of that letter occurred as follows:





"MR. NISSEN: . . . This file contains a handwritten letter from the Loswicks dated July 18, 1962, a photocopy, your Honor, of a letter, with the typing on the top, 'ORIGINAL LETTER SENT TO BERT ROSS'. Perhaps I can read a portion of Mr. Loswick's letter:

'Dear Mr. Wise:

According to news reports from the California Real Estate Commissioner, Mr. Wynne A. Savage, my longstanding fears of your company's misrepresentation, and outright fraud, has been well founded. On advice of my attorney I hereby serve notice that I will institute court proceedings against your firm, not only to recover every cent my wife and I have paid you on this worthless land, but also include a damage suit also, if your company do not forthwith return all the moneys paid you. That you and your company could do this to two old persons like myself and my wife, who last year lost our only son," and so forth.

"THE COURT: Those portions are not material, Mr. Nissen.

"MR. NISSEN: I started to read a sentence, and I have been criticized for not reading full sentences.

"THE COURT: Anything further on that letter?

"MR. NISSEN: Yes, sir.

'We went into this buy on the strength of our



confidence and faith in Mr. Rosenberg, but I can see now that you all are a bunch of schemers and unfaithful to words and promises. '

"THE COURT: I will have to interrupt you, Mr. Nissen.

"MR. NISSEN: All right, sir.

"THE COURT: We will take our noon recess now, ladies and gentlemen. " (6362-6363)

The defense later complained about the Government having read portions of the above letter and the Court said "Don't read those things, Mr. Nissen. " (6366-6367) The prosecutor explained that he was deciphering the writing as he was going along and when he realized what he was reading he stopped. (6367)

The record shows that the letter was handwritten and in addition a photocopy (6362) which was difficult to read. (6367) The record also discloses that the prosecutor stopped reading the non-pertinent material before any comment was made by the Court. (6363)

Appellant's accusation that the prosecutor "deliberately disregarded the court's instruction" not to read such matter is simply false. (Appellant's Brief, p. 120; 6371) One interruption of the prosecutor while reading the letter was for a lunch recess rather than for "misconduct" as Appellant alleges. (Appellant's Brief, p. 120)

Nowhere does appellant establish that the Government tried



to incite passion, prejudice or sympathy. The cases he cites have no relevance to what occurred at his trial.

7. The Prosecution Made No Claim  
That All Out-of-State Land Subdivi-  
sions Are Fraudulent.

---

As appellant states, appraiser Trescartes testified that Gamble land was worth far less than what it sold for. The defense then elicited that there were other desert subdivisions in Nevada selling at even higher prices. (6706-6757) The questions asked of Trescartes concerning these other subdivisions of which appellant now complains, merely sought to determine whether the buyers of those properties were well-informed, or whether they had been deceived. How this can be interpreted as insinuating that all out-of-state subdivisions are fraudulent appellant does not explain.

Appellant also complains of an incident in which Reisman was cross-examined about a letter (Ex. 3-2082) which Rockel sent to Reisman with an attached newspaper article about out-of-state land development, in accordance with what Reisman described as Rockel's general policy with any article of this type. (13805-13810, 13812) After reading the article (13807-13810) the Government asked Reisman: "I ask you, did you regard that the company you were involved with, Gamble Ranch, was using people's dreams of retirement and security to get them to pay money on property that was like this, covered with sagebrush and so forth?" To which Reisman replied: "Absolutely not." (13810) On direct





examination of Reisman by his counsel the following had occurred:

"Q. Mr. Reisman, at any time during the period under discussion have you ever had any belief or intention of any kind or character that you were engaged in any sort of fraudulent practice?

"A. Absolutely not. Just [such] a thing could never enter my mind." (13332)

The obvious purpose of the prosecutor's question was to test the credibility of Reisman's "good faith" defense by inquiring if upon reading the article he did not realize that he might be engaged in a promotion which was deceiving purchasers. All of appellant's ranting about innuendo cannot change a proper interrogation into an attempt to insinuate that all out-of-state subdivisions are fraudulent. The cases he cites in support of his argument have no relevance to what occurred at his trial.

Although appellant devotes 58 pages of his brief to his claim of "pronounced and persistent misconduct by the prosecutor," he fails to show any genuine instance of misconduct. A reading of the transcript refutes every one of his charges, which appear to be merely a continuation of the defense trial tactic of unfounded accusation.



D. REISMAN WAS ASSOCIATED WITH  
THE SCHEME AT THE TIME OF ALL  
MAILING COUNTS ON WHICH HE WAS  
CONVICTED.

---

Appellant states that "his role up to mid-1960 was simply that of attorney acting in an advisory capacity, and, as is done by many attorneys, accepting a position as an officer and director." (Appellant's Brief, p. 141) He conveniently ignores the rule that on appeal, the evidence is to be viewed in the light most favorable to the Government, Kaplan v. United States, 329 F.2d 561 (9th Cir. 1964), and bases his contention on the testimony of Reisman which was refuted by other evidence.

Despite Reisman's claim that he was merely an attorney for the company, Reisman never billed the company for any of his services (Nickels, 13232) and the company never paid him for them. (Rockel, 5741) The date Reisman became a shareholder (June, 1960) does not reflect the date he joined in the scheme. This is shown by the fact that he loaned the company \$10,000 in March, 1960 (Ex. 1-261, p. 28) and by the many company activities he participated in before June, 1960. For example, in September, 1959, Byrnes, Benaron and Reisman negotiated the release of some of the land from Stewart's mortgage, and said it would be resold in smaller parcels. (Stewart, 908-910) In October, 1959, Reisman was advised of the need for studies, tests, and experiments before the land's suitability for agriculture could be determined. (Allen, 987-990) At the same time, Reisman was informed of Governor



Sawyer's objection to use of his letter, and of Clejan's promise not to use it further. (Allen, 993-994) Reisman contacted the Real Estate Commission on behalf of Gamble Ranch prior to November 6, 1959, (Block, 7152-7153) and on that date Reisman, Byrnes and Benaron met and discussed the Commission's "stop order" and allegations of misrepresentation. (Allen, 998-999, 1010) Reisman thereafter handled most of the problems arising from the order. (Clejan, 4536; Allen, 1000) Reisman objected to the prominence of unfavorable items in the required public report, but withdrew his objection on the assurance of the sales manager that such a report would not interfere with sales. (Block, 7052-7056) By the end of December, 1959, Byrnes and Reisman had become officers and directors of the company. (Ex. 1-261, p. 20) Reisman was president. (Benaron, 12288) In December, 1959, Byrnes, Benaron and Reisman visited the Gamble Ranch (Stewart, 953-954; Allen, 1129-1131), and they did so again in July, 1960. (Blackwell, 6129) Reisman also conferred with water engineer Stetson in December, 1959. (Stetson, 10001-10002) In January, 1960, Reisman contacted Raft River and asked what it would take to get electric power to the locations where people were buying land. (Schlender, 5224-5238) Reisman's later participation in the scheme is briefly covered in the Statement of Facts.

Appellant's contention that his resignation as officer and director must be taken as the date on which he withdrew from the scheme (Appellant's Brief, p. 141), is hardly persuasive in view of evidence that Byrnes, Benaron and Reisman all resigned because





of the Real Estate Commission investigation (S. Weiss, 4683), and that the naming of company employees as officers to replace them was merely a formality. (Carey, 6256) Reisman's resignation was hardly the type of affirmative conduct showing withdrawal from a criminal conspiracy which the law requires. Hyde v. United States, 225 U.S. 347 (1912); Baldwin v. United States, 72 F.2d 810, 814 (9th Cir. 1934), cert. denied 295 U.S. 761.

Even if Reisman's claim that he was improperly convicted on counts before June, 1960 and after June 15, 1962, were correct, he would be entitled to no relief on appeal. His sentence of imprisonment (which was suspended) was imposed on all counts to run concurrently, and the law is well-settled that under those conditions a valid conviction on any count will sustain that portion of the sentence. Abrams v. United States, 250 U.S. 616, 619; 279 U.S. 263; Ybarra v. United States, 330 F.2d 44 (9th Cir. 1964); Stein v. United States, 263 F.2d 579 (9th Cir. 1959).

With regard to the remaining portion of the sentence, Reisman was fined \$800 on each of thirty-eight counts totaling \$30,400. No fine was imposed on any count involving mailings after June 15, 1962. He was fined on only five counts involving mailings prior to June, 1960 (Cts. 58-60, 67), the earliest of which was April 1, 1960 (Ct. 58). Even if Reisman's conviction on these five counts were improper, he would still stand convicted on the 33 remaining counts on which he was fined. The total fine imposable on these 33 counts is \$33,000 and Reisman's



total fine was only \$30,400. Where the total fine imposed does not exceed that which could have been imposed on counts upon which conviction was valid, errors with respect to other counts are not grounds for reversal. United States v. Monarch Distributing Co., 116 F.2d 11 (7th Cir. 1940), cert. denied 312 U.S. 695.

E. APPELLANT WAS NOT ENTITLED TO  
PRE-TRIAL DISCOVERY OF THE GRAND  
JURY TRANSCRIPT.

---

Long before trial, Appellant moved for "an order permitting him to inspect the minutes of the Grand Jury . . . insofar as they relate to the proceedings resulting in the return of the indictment herein" on the ground that he needed them "to properly prepare his defense." (C. T. 246] This motion was denied. [R. T. 141]

The Court's refusal to give the transcripts to the defense prior to trial was obviously correct. Rule 6(e), Federal Rules of Criminal Procedure, cloaks the transcript with secrecy. Even after a government witness has testified at trial, his grand jury testimony is not producible without a showing of "particularized need," Dennis v. United States, 384 U.S. 855 (1966); Osborne v. United States, 371 F.2d 913 (9th Cir. 1967), except in a few jurisdictions. United States v. Youngblood, 379 F.2d 365 (2nd Cir. 1967). Appellant did not request any Grand Jury transcript after a witness had testified, much less show a particularized need for it.

Appellant cites no pertinent case to support his alleged right to pre-trial inspection of the entire Grand Jury transcript. State of



Washington v. American Pipe Construction Co., 41 F. R. D. 59 (W.D. Wash. 1966), cited by appellant, is not in point. That was a civil, anti-trust, treble damage suit arising after the defendant had pleaded nolo contendere in a criminal anti-trust case. The District Court entered an order which inferred that Government counsel had authority to apprise counsel for private plaintiffs that testimony of a deposition witness was or might be inconsistent with his grand jury testimony. However, the order expressly provided that no grand jury transcript or extract therefrom could be revealed to non-government counsel. (pp. 61-62)

V

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

DAVID R. NISSEN,  
Assistant U. S. Attorney,  
Chief, Special Prosecutions  
Division,

Attorneys for Appellee,  
United States of America.

DORIS R. WILLIAMSON,  
Attorney,  
U. S. Department of Justice

Of Counsel





CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ David R. Nissen

DAVID R. NISSEN



APPENDIX A

California Real Estate Commission Order  
of November 6, 1959  
(Ex. 1-237)





STATE OF CALIFORNIA

Division of Real Estate  
November 6, 1959

Mr. Arnold Clejan, Individually

Arnold Clejan, Agent of Gamble Ranches, Inc. and of Gamble Ranch Development Corporation  
Arnold Clejan, President of Gamble Ranches, Inc. and of Gamble Ranch Development Corporation

Arnold Clejan, Owner and Developer  
Gamble Ranches, Inc., a Nevada Corporation  
Gamble Ranch Development Corporation, a Nevada Corporation

-and-

Gifford & Cogan, Incorporated (Exclusive) Sales Agents for Gamble Ranch  
9412 Wilshire Boulevard  
Beverly Hills, California

Attention: Mr. Loyal Douglas Gifford, Real Estate Broker

IN RE: TRACT NO. - GAMBLE RANCH  
ENC. NO. - 17003

(Commissioner's Order No. 11224)

Gentlemen:

1. Reference is made to prior letters from this office dated August 28, 1959 and September 16, 1959, addressed to Mr. Arnold Clejan, with reference to his subdivision filing on property in Elko County, Nevada.

2. The letter referred to above dated September 16, 1959 requested that Mr. Clejan desist and refrain from further offering of this property for sale in California until full compliance is made with the Subdivision Law of California by completing the filing which you made with the Division of Real Estate on August 26, 1959. (Receipt No. 2 22334)

3. Mr. Albert H. Allen, Attorney, 9350 Wilshire Boulevard, Beverly Hills, California, in a letter addressed to this office dated September 1, 1959, stated as follows:

"... Apparently Mr. Clejan has filed the application for subdivision under a misapprehension and he now seeks the withdrawal of such application.

"The property which Mr. Clejan owns is agricultural property and he proposes to sell the said property in parcels of more than 20 acres each, generally in parcels of 40 acres or more to persons who will use said property solely for commercial agricultural purposes. I have advised Mr. Clejan that under the provisions of Section 11000.5 of the Business and Professions Code, the division of property into parcels of 20 acres or more which are to be sold solely for the use of commercial agricultural purposes, are exempt from the provisions of the Code requiring the filing of subdivision maps and obtaining permission from the Department of Real Estate for a permit authorizing the sale of said property.





"This property will be sold only in parcels in excess of 20 acres and solely for the use of commercial agricultural purposes and no other purpose. Appropriate legends to that effect and provisions with regard thereto will be contained in any contract or agreement for the sale of any parcel of property. ... "

4. Without going into great detail at this time, it is desired to promptly advise you that from the information examined and from the data and proposed advertising and contract forms you have submitted, the Commissioner has concluded that the offering in California of said lands in Nevada for sale, is subject to the Subdivision Law of California and is not exempt under Section 11000.5 thereof and that the Commissioner can not approve such material but must prohibit its use for the following reasons.

5. It appears that many of the representations and much of the material which you have used or which you propose to use in offering said Nevada land for sale is incomplete, misleading or deceptive and that its use will result in a fraud upon the buyers, investors and the public.

6. For example, let us consider the blue colored sales brochure offering for the property which is distributed by you to residents of California who are prospective purchasers. It is headed: " 59 Gold Strike! Gamble Ranch, Home of the famous UC brand in Elko County, Nevada." It has a large reproduction of contented, grazing cattle in a fenced enclosure.

It is now understood that you concede that such picture was not even taken on the Gamble Ranch property, but is a reproduction of a picture taken on other property or from a Chamber of Commerce pamphlet. This constitutes false advertising under Section 10140 and 11020 of the Business and Professions Code.

7. The first inside sheet page of the blue colored offering brochure mailed to residents of California who are prospective purchasers of such 40 acre tracts in Nevada has the heading:

"Strike It Rich! " with a caricature of a gold miner holding a nugget in his hand. It does not disclose that buyers receive no oil, gas and mineral rights, all of which seller reserves.

8. Further, the blue sales offering brochure describes the property as:

"... a range land, so abundant, so fertile ... fertile ranch land; valuable ranch land that offers you security ... working ranch land that will produce ... will provide income for you and your family ... once in a life time opportunity to invest in ranch land ... the greatest investment value in the United States is now yours ... rolling-rich valleys of verdant range and meadowland ... abounding in springs, streams and reservoirs ... with winters that are generally mild and comfortable ... has the flexibility of modern ranching ... with capabilities and facilities for herding, fattening on minimum cost ranch-grown grain, selling and shipping cattle and livestock from its own railroad loading chutes ... Farming: The abundant water supply on the famous Gamble Ranch provides a rich and fertile crop-land for alfalfa, grain, truck farming and orchards. ...

"Federal Aid

"With the federal government sharing the cost of soil and water conservation and improvements such as fencing, planting grasses,





legumes, trees and shrubs, constructing wells, ponds or dams, developing springs or installing water line, the investment advantages of owning property on the famous Gamble Ranch is very attractive. With this government help, and the abundance of water for proven productive soil, the capital gains tax structure works for the ranch owner, providing your working investment with comfortable returns. ... "

9. In the blue sales offering brochure above referred to is a reproduction of a form entitled "Guaranty of Safety and Security" and stating that Seller will allow buyer an exchange privilege, anytime during the terms of the installment contract to trade in his acreage for any other available acreage of seller in the Gamble Ranch. ... "

10. Much of the foregoing representations in the blue brochure appears to be blatantly misleading and deceptive. Such offerings are being made as more of a gamble or speculative investment to "59 Gold Strike! ... Strike it Rich", rather than being offered to purchasers solely for commercial agricultural purposes. Yet, seller reserves all oil and gas and mineral rights for himself, which fact is not disclosed in the firm's sales brochures and newspaper advertising.

11. Just what, if any, part of the Gamble Ranch Mr. Arnold Clejan owns or what investment he has made is a great question.

We examined the Involuntary Petition in Bankruptcy filed in Federal Court at Los Angeles, California, Case No. 70411-C, in which he was adjudged a Bankrupt on March 1, 1956, and from which proceeding it appears he has not been Discharged. In fact, the Referee in Bankruptcy on two occasions, the last on December 13, 1956, denied the Bankruptcy Discharge and prepared Finding of Fact - that:

" ... on or about the 31st day of May 1955, the hereinabove bankrupt did give a statement in writing to Dun & Bradstreet, signed by himself, concerning his financial condition ... III that the bankrupt indicated cash in the sum of \$16,423.00 whereas in truth and in fact said cash amounted to only \$3,159.00. ... IV That the statement so made was a false statement and was given with the hope, expectation and intention of obtaining credit thereon ... V. That under the heading of assets, the bankrupt showed an inventory of \$73,126.00 whereas in truth and in fact the said inventory as of the 31st day of May, 1955, was only \$24,950.00. ... "

12. It appears that Mr. Clejan's business background has been mainly with silks and textiles and with the ownership and operation of local retail ladies and childrens' Ready to Wear Shops, formerly known as Lord's of California, 8638 West Pico Boulevard, Los Angeles and Lord's of Westchester, 8905 Sepulveda Boulevard, Los Angeles.

13. In view of the pending action in Federal Court at Los Angeles, California, Case No. 70411-C in which Arnold Clejan has been adjudicated a bankrupt and from which he has not been discharged, it is seriously questioned as to just what interest or ownership he may have in the Gamble Ranch properties or sales promotion venture relating thereto.





14. Also, the aforesaid findings of the Referee in Bankruptcy that Arnold Clejan intentionally signed and submitted a false financial report to Dun & Bradstreet, of course raises the question as to what credibility should be given to any of his representations, as to the nature of his present sales offerings and sales promotions both in his advertising material and in his application for a Subdivision Report from the Division of Real Estate of California.

15. At a recent conference held at this office on October 29, 1959, Mr. Arnold Clejan and his Attorney, Albert H. Allen, advised that the forty acre tracts advertised for sale by Arnold Clejan and the corporations he controls, as properties of the Gamble Ranch, Inc. were not included in any of the improved ranch and farm lands of the Gamble Ranch but were unimproved sage brush lands located in the shaded area of the sales brochure lying south of the town of Montello.

16. It has not been shown to us that there are any water, springs or reservoir water available for, or that the land offered for sale is suitable for development as commercial agriculture property. There is no showing of the cost of developing water for commercial agriculture use or whether any is available there.

17(a) A private land service operator, Fred Harris, known as Nevada Ranch Service, Elko, Nevada, has given Mr. Clejan a letter dated September 1, 1959, stating that land in the Montello area is suitable for commercial agriculture, and listing crops and fruit which he says the soil resources are capable of producing on a commercial basis. He does not state whether such crops can be dry farmed or will need irrigation.

(b) To a stranger the name Nevada Ranch Service might erroneously imply that the opinions expressed were those of a county or state service instead of simply what the letter shows as a private enterprise for profit, offering,

"A complete Land Service for the Range Livestock Industry."

(c) What, if any, soil tests Mr. Harris has made, whether he has examined the particular land offered for sale at this time or what qualifications he has as to the opinions he has expressed as to commercial farming operations, are not known to us.

18(a) There appear to be various misrepresentations in offering said 40 acre tracts for sale, particularly in the promotion-advertising material. For example in the blue colored sales brochure referred to above, it is stated that Federal Aid is available to purchasers.

(b) Mr. Clejan and the Gamble Ranches, Inc. and Gamble Ranch Development Corporation must know that Federal Aid is available only on land now in agricultural production. The program is not applicable to the development of new or additional farmlands by measures such as drainage, irrigation, and land clearing, for the purposes of carrying out approved soil and water conservation practices, etc, etc, as outlined in Paragraph 6 of the U. S. Department of Agriculture Handbook for 1959, page 2. It is apparent that such representations that Federal Aid would be available to speculators, investors, buyers, future farmers as to the tracts offered for sale are misleading and unfounded.

19. Any recitations or legends in the firm's contracts that the tracts are being solely offered and purchased solely for commercial agricultural purposes, are not controlling in the light of the numerous items of proof that it is offered principally as a speculative investment. ... "Strike It Rich .. "59 Gold Strikes", etc. etc.





20. Whether or not water for commercial agriculture development could be produced on those tracts is a question. A letter dated August 29, 1959, signed by Harold C. Anderson, 251 West Commercial Street, Elko, Nevada, advises Mr. Clejan that water for domestic purposes is available and for all culinary use and could be extended to lawn and garden irrigation, etc. etc. That indicates a very limited supply of water is available, nor is it clear what "available" means. Such comments do not establish that any water is presently available on these tracts which are being offered for sale, for commercial agriculture purposes.

21. The developed lands on the Ranch are not being offered for sale, we are advised.

22. We are advised that Mr. Arnold Clejan, early in 1959, was advertising in local newspapers for "Cheap Acreage Raw up to 100,000 acres". We conclude that what he is now selling is "raw land" and not commercial agricultural land.

23. Newspaper advertising of the Gamble Ranch 40-Acre Ranches appeared in the Los Angeles Herald and Express of September 4th and 25th, 1959 and full page advertisements appeared in the Los Angeles Times of September 13, 1959 and November 1, 1959.

24. We are not advised as to any ownership or investment Mr. Clejan may have in the 600,000 acre Gamble Ranches, Inc. property but in view of the pending Bankruptcy action in Federal Court at Los Angeles, California, in which Mr. Clejan has been adjudicated a Bankrupt, clarification of any offerings and representations he now makes appear to be in order. There is a large blanket mortgage, purportedly amounting to some \$400,000. against the property and there has been no proof submitted that clear titles can be issued to purchasers if as and when their individual contracts are paid up.

25. We are informed that Mr. Clejan is President of Gamble Ranch, Inc. and Gamble Ranch Development Corporation and is agent and developer for both in connection with the aforesaid subdivision filing. We are also informed that neither of these corporations is authorized to do business in California not having registered with the Corporation Division of the Los Angeles County Clerk's Office; nor is either of these firms, nor their agents or brokers, offering said lands for sale in Nevada but propose to make all such sales at their broker's offices in Beverly Hills and through sub-agents in other parts of Southern California.

We are also informed that Mr. Clejan owns 90% of the stock of both of said Nevada corporations and exercises complete control thereof and hence said corporations may be deemed to be his alter egos, as he is now a bankrupt, any funds paid to him or to his alter egos would be subject to the bankruptcy court; hence to permit contract purchasers to pay moneys to Clejan or to said corporations might well result in the total loss thereof unless provision is made for such payments to be placed in trust for the purpose of lifting the blanket lien as is required by Sections 11013 - 11013.2 of the Business and Professions Code. Such offering sale must therefore be prohibited for non-compliance with said sections.



26. In view of each and all of the foregoing facts and circumstances, the Real Estate Commissioner is of the opinion that the use of the foregoing sales promotion material would tend to mislead the public and would be investors or purchasers and would be violative of the aforesaid Subdivision Rules and Regulations implementing it.

(a) The sale of said lands is subject to the Subdivision Law of California, Business and Professions Code, Section 11,500 et seq. and is not exempt therefrom by Section 11500.5.

(b) That the material used constitutes false advertising. Therefore, you and each of you, your agents, employees, are prohibited from using, disseminating or publishing sales promotional material referred to above, pursuant to Sections 11517(f), 11520 and 11540 of the Real Estate Law, and from using any of the aforesaid advertising and sales promotional literature and from offering this property for sale in California until you have presented evidence to the Commissioner which will show that it does not have a tendency to mislead in the respects referred to above and/or until you have fully complied with the Subdivision Law, including provisions for releasing the blanket lien, and have completed the filing you started with this office and a Subdivision Report has been issued by the Commissioner.

If you so desire, you may file a written request for a hearing with this office to be held here within 30 days of this Order, in accordance with the provisions of Section 10734, Statutes 1959, Chapter 286, Section 1, of the Business and Professions Code of the Real Estate Law.

DATED: November 6, 1959

W. A. SAVAGE

Real Estate Commissioner  
State of California

By Henry H. Block Deputy

cc" H.R/ Albert H. Allen  
Attorney at Law





APPENDIX B

Reproduction of Pace Filmstrip

(Ex. 2-1058)

and

Transcription of Accompanying Sound Recording

(Ex. 2-1058)







1. (Music)



2. (Music)



3. (Music)



4. This is a small part of a great western tradition. A vast cattle and land empire. The world famous Gamble Ranch.



5. Here remain the magnificent vistas, the clear clean air, the fertile earth first glimpsed by the rugged American frontiersmen of the early 1840's.



6. Over this land, trail blazing as they went, our forefathers brought their families, their herds, to new land.







7. For almost a hundred years the Gamble Ranch has been a successful cattle operation.



8. The land here is abundant in feed and water and the climate ideal.



9. Today the old wagon trails are modern super highways like trans-continental U. S. 40, linking the length and breadth of America. Highway 30 runs directly through Gamble Ranch -



10. As does the main line of the Southern Pacific Railway on its way to San Francisco and the Pacific.



11. Look closely at this map. As you can plainly see, the world famous Gamble Ranch lies in the hub of the 11 western states -- directly in the path of the economic and population explosion occurring now in America, and especially Western America.



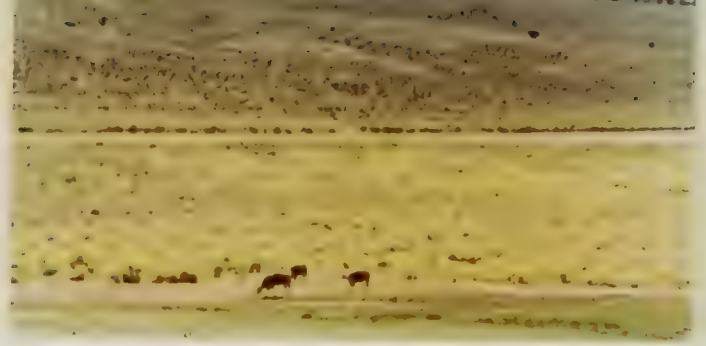
12. The world famous Gamble Ranch, the largest single ranch under one fence in the continental United States, acres of fertile scenic beauty -- if placed on a map of Southern California,







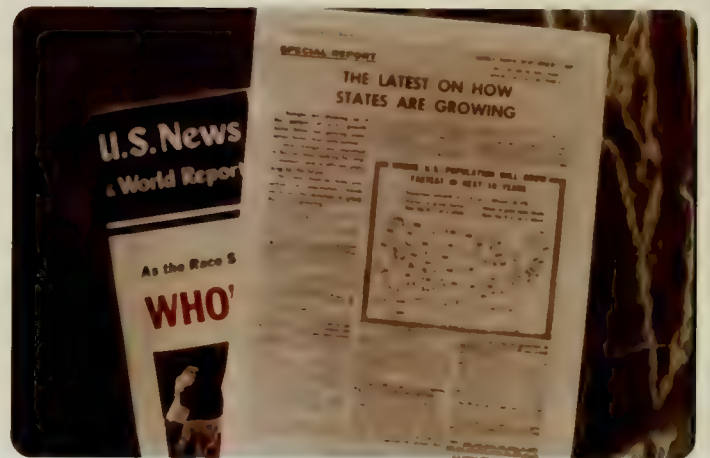
3. the ranch would reach from Los Angeles to San Bernardino, some 53 miles in length--from Pomona to Balboa, some 22 miles in width.



14. Millionaire celebrities like Bing Crosby and Jimmy Stewart invested here in Elko County Nevada. But you needn't have millions to own your share of the future of Western America.



5. The world famous Gamble Ranch has decided to make available acreage in a small portion of their gigantic holdings. Parcels ranging from 2½ acres on up are being offered to the public to keep pace with western population expansion.



16. In the past ten years Nevada has led the nation in population increase percentage wise. A whopping 63% increase. And U. S. News and World Report predicts the state population will up 37.9% in the next ten years, making it the fastest growing state in the Union by far.



7. The government of the State of Nevada is making every move to encourage this rapid growth. Here's a quotation from a letter written to the developers of the world famous Gamble Ranch from the Honorable Grant Sawyer, Governor of the state of Nevada.



18. "On behalf of this office and the state of Nevada, I would like you and your friends to know that this state will most heartily welcome such a development which accords with a basic policy of this administration - orderly development and expansion.







to bring several  
ambitious program.

On behalf of this office and the State of Nevada,  
I like you and your friends to know that this State  
most heartily welcome such a development which accords  
basic policy of this administration: orderly develop-  
ment and expansion of this State rapidly, but surely.

We shall, therefore, be glad to cooperate in every  
within the channels of governmental functions to assist  
to accomplish such development and expansion. Let me  
personally wish you the best of success in this program.

Sincerely,

*Grant Sawyer*  
Grant Sawyer

19. We shall therefore be glad to cooperate in every way within the channels of governmental function to assist you to accomplish such development and expansion. Let me personally wish you the best of success in this program. Sincerely, Grant Sawyer, Governor".



21. The world famous architectural firm of Victor Gruen & Associates has submitted master plans for the suggested new communities within the ranch.



23. A suggested new city--

20. To insure that the development of Gamble Ranch would adhere to the policies of the government of Nevada, no expense was spared.



22. Only after intensive research on the area did Gruen's expert staff submit their plans.



24. Civic center-- Planned shopping center to rise on the ranch.





25. Adoption of these plans would insure the orderly growth of the community.



26. Already it's starting. New accommodations for the increasing tourist activity are being built and Gamble Ranch is destined to become one of the great sports meccas of America.



27. Beautiful blue water provides excellent boating. Uncrowded water areas waiting to be explored.



28. Water-skiing on a placid reservoir --bigger than some lakes and harbors



29. Rainbow and brown trout that are no fish story, are teeming in the government stocked reservoir right on the ranch.



30. If hunting is your meat, the upper-reaches of the ranch provide game in abundance. Twenty-two hundred head of deer taken last season alone and when the deer season is over--







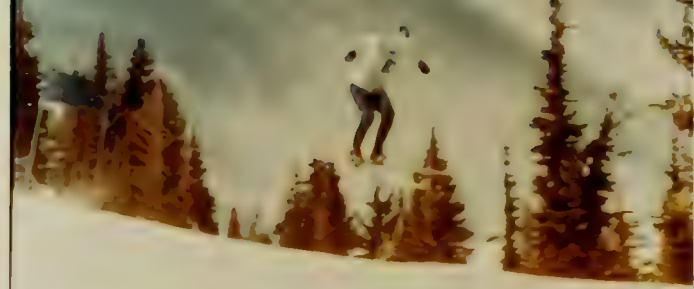
31. Prize winning duck and game bird can be your next target.



33. for in town fun it's only a short drive to the towns of Wells or Elko, Nevada.



35. On the ranch itself is the town of Montello-- small but already feeling the surge of expansion.



32. In the winter the easily reached snow covered mountains of the state will provide you with the fun of winter sports and--



34. Here is Las Vegas or Reno in miniature with a true western atmosphere and a hustling, bustling vitality.



36. Here you can build-- raise your family in the American tradition. Away from smog filled cities.







37. Here togetherness means something new and fresh.



39. The three R's are taught in this Montello school where there is still time for individual personalized instruction.



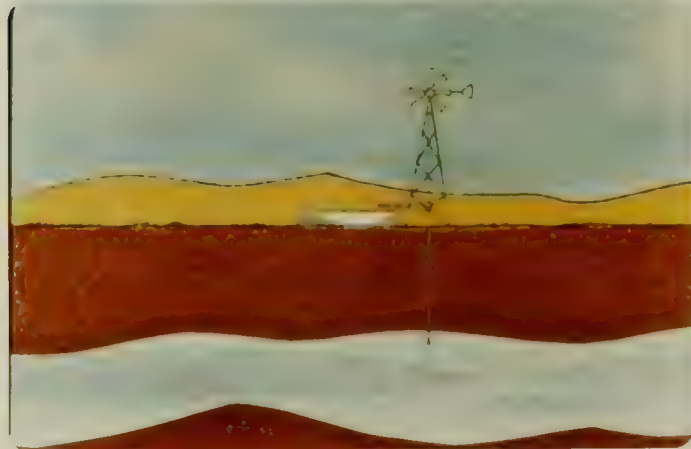
41. Water in many areas is just below the surface of the ground. The consulting engineers, Stetson, Strauss & Dresselhaus, commissioned by Gamble Ranch, reported --



38. Youngsters are healthy and rugged.



40. Water is in abundance. Easily drilled wells bring in plenty of water.



42. "The ranch lies in the Utah-Nevada water basin with no river outlet to the sea. All precipitation remains sub-surface, forming a vast lake beneath the land."







43. Electricity is here, and you can watch your favorite television western with reception bright and clear.



45. And you have the opportunity of owning land here. Imagine having a ranch of your own for a fraction of what you might pay for a desert lot.



47. You could divide ten acres into four -  $2\frac{1}{2}$  acre parcels today-- not tomorrow but today. And each  $2\frac{1}{2}$  acres is equivalent to ten city lots in area.



44. The climate and soil resources are capable of producing numerous types of crops and the valley is sheltered from violent storms and wind by the surrounding mountains.



46. Real estate holdings are the basis of all great fortunes. Land values have vastly increased while inflation has whittled away at the buying power of your dollar.



48. Or keep this precious land. Enjoy it and realize the ever increasing value of this beautiful country-- your country.





49. Pass this legacy, this heritage, on to your children. You had chances before and you missed out. But a small investment today will make you a land owner.

50. Here is your chance to own acreage, buying direct from the original subdivider. Your chance to own a ranch with elbow room with a profit potential second to none.



51. The opportunity to own a piece of the tradition of the Old West--

52. The opportunity to watch your dollars grow in the modern west is yours now, today -- Don't miss it!



53. The End.





APPENDIX C

Reproduction of Photograph of Land

Being Sold South of Montello

(Ex. 2-267-V)







APPENDIX D

Schedule of Purchaser Witnesses





SCHEDULE OF PURCHASER WITNESSES

<u>NAME</u>	<u>TRANSCRIPT</u>	<u>PAGES</u>
Ackerman, Phyllis A.	2266 -	2374
Adams, John C.	8598 -	8632
Ayers, Alfred W.	2554 -	2631
Barham, Dona M.	2707 -	2794
Barras, Mildred	6952 -	6995
Bauer, Pearl	6630 -	6705
Bell, Frances	8539 -	8598
Blackwell, Ray	6122 -	6248
Boothe, David	4144 -	4231
Burks, James F.	8278 -	8325
Burt, Frank	8427 -	8461
Coxe, Susan	6564 -	6629
Davidson, Albert Wesley, Jr.	3499 -	3715
Dennis, Lorraine	7851 -	7922
Ellwood, Harold Fay	2873 -	2984
Farmiloe, Bert	7431 -	7450
Fleischmann, Frederick A.	8131 -	8186
Fowler, Glenn	7530 -	7610
Gibson, Woody	7611 -	7665
Glasgow, Willis H.	8462 -	8513
Graham, Clarence	3716 -	3780
Hansen, Lawrence C.	3371 -	3458
Hazlewood, Blanche	8042 -	8080



Imler, Virginia Lee	2672	-	2706
Ingraham, Edward Kenneth	3781	-	3836
Iverson, George	7674	-	7731
James, William P.	2838	-	2873
Jones, William T.	8326	-	8350
Kaczmarczyk, Doris	8080	-	8090
Lannigan, John	2985	-	3018
Lombardi, Marie	8513	-	8538
Loswick, William M.	8233	-	8278
Lytle, Robert	7961	-	7988
Monroe, Roy	8092	-	8131
Morse, Verne	8187	-	8231
Munger, Alfred	7370	-	7431
Murray, George B.	8671	-	8702
Patterson, Phyllis	4630	-	4664
Prosser, Royce S., Jr.	8702	-	8754
Rogers, Winifred I.	8018	-	8042
Rose, Joan	6916	-	6943
Smith, Clyde W.	8351	-	8387
Smith, Lois	2822	-	2837
Sorrell, Isaiah	7824	-	7851
Stancil, Albert	5081	-	5104
Stancil, Odelle Ann	5073	-	5081
Starick, Sue C.	7923	-	7961
Suehnholz, Ellamay	6096	-	6121



Tannas, Boris	7305	-	7369
Uribe, Luis	7732	-	7792
Wallum, Peter	7006	-	7037
Whitlock, Sandra Janet	8632	-	8670
Wilson, Richard K.	3019	-	3101
Wold, Charles B.	2430	-	2525
Zimmerman, Robert Martin	2632	-	2671





## APPENDIX E

Schedule of Misrepresentation Charged in Indictment,  
and Summary of Evidence Proving Their Falsity



## PRESENTATIONS

## PROOF OF FALSITY

### The Ranch

The 600,000 acre Gamble Ranch was being subdivided and sold (Ex. 2-1074)

The Ranch had been "kept off the market for decades" (Ex. 2-32, newspaper P. 11)

The Gamble Ranch is "World Famous" (Ex. 2-1058 and 2-1059, film strip, Frame # 4)

The promotional material (Ex. 2-1058 and 2-1059 for example) is mute with regard to Federal ownership of the alternate sections on the ranch. The checkerboarded pattern of the sections of land within the boundaries of Gamble Ranch is depicted on Bureau of Land Management maps (Ex. 2-1230) and on various pieces of promotional material (Ex. 2-249). B. M. Stewart testified he conveyed title to 236,000 acres to Arnold Clejan and two business associates in 1959 (R.T. 894 and 903). As of August 31, 1961, Westates Land Development Corporation owned in fee approximately 236,000 acres of land on the Gamble Ranch. The company was entitled only to grazing privileges in approximately 364,000 acres of land in areas adjacent to the Gamble Ranch checkerboarded sections owned in fee (Ex. 1-261, P. 3). Stewart testified the initial release of acreage from the liens of two deeds of trust and a mortgage covered 10,000 acres, that the principal release involved 40,000 acres, all south of the railroad; and that later on there was a release of 7,000 acres north of the railroad (R.T. 905-910). With the exception of the latter 7,000 acres, sales were limited to that portion of the Gamble Ranch south of the Southern Pacific railroad tracks (Ex. 1-243 and 2-1075). Donald Clark, who maintained the inventory of available parcels for sale from March, 1960, until sales were stopped, testified he prepared Exhibits 1-243 and 2-1075 to reflect sections of land for which the California Division of Real Estate had issued Public Reports (R.T. 3895 to 3897; 3914 to 3919).

Prior to 1959 the "World Famous" ranch was unknown to the men who became the principals. Postal Inspector Jacobson testified that in response to his question Reisman told him he first heard of the Gamble Ranch when he was asked to represent Benaron and Byrnes in



regard to purchase of the ranch from Clejan (R.T. 9174). The Postal Inspector also testified the principals Benaron and Byrnes told him they first heard of the ranch when approached to participate in the venture (R.T. 9168 and 9201), that Benaron told him he could not state that the Gamble Ranch was world famous (R.T. 9202).

### Land, Soil and Crops

"Lush farm lands"  
(Ex. 2-128, color brochure)

"Fertile ranch-land"  
(Ex. 2-19, black & white brochure)

"Rich grazing land"  
(Ex. 2-19, black & white brochure)

"Workable ranch-land with unlimited produce-ability"  
(Ex. 2-19, black & white brochure)

"Fertile crop land"  
(Ex. 2-19, black & white brochure and Ex. 2-1074, newspaper, P. 8)

"Not desert and rocks but workable land... land that will produce"  
(Ex. 2-1074, newspaper, P. 6)

"Good, arable land that should be farmed"  
(Ex. 2-1074, newspaper, P. 21)

"Rich fertile valley land"  
(Ex. 2-1-C & 2-2-0, radio & TV script)

Whatever croplands there are, fertile or otherwise, are located on the northern sections of the ranch, which lands were never subdivided and offered for sale. Stewart, who acquired the 30 by 36 mile ranch in 1952, (R.T. 883) testified that vegetation in the Montello Valley consists of various types of sage which are typical of northern Nevada and used as winter range for cattle, (R.T. 887-888) that none of the improved lands were released by him from the lien of the trust deeds and mortgage (R.T. 910), that the principals first wanted released the flat land south of the railroad tracks which was the least valuable (R.T. 955), that he never considered it suitable for farming and that he told the appellant and his associates what his ideas were and findings had been relating to the soil and its conditions and feasibility of what could be raised, and never told them the land south of the tracks is rich, fertile cropland and rich for growing grains and orchards (R.T. 14,127 - 14,128). The witness also testified there are two portions of the Montello Valley, the dividing line roughly being the railroad tracks, the soil in each being entirely different, and there being only 3,000 acres of desirable farmland south of the tracks in one particular section (R.T. 14,140).

Stewart testified that he was able to grow on Gamble Ranch alfalfa, corn, barley and wheat, and that he so advised Clejan (R.T. 939 - 940).





"Real rich lush land" "For a fraction of what you might pay for a desert lot"  
(Ex. 2-280, radio script, P. 4; Ex. 2-1058 & 2-1059, film strip, Frame 45)

"Rich land, unequalled anywhere"  
(Ex. 2-282, P. 4)

"Land with a richness unexcelled"  
(Ex. 2-280, radio script, P. 1)

"Abundant in feed and water"  
(Ex. 2-1058 & 2-1059, film strip, Frame 8)

"A valley of beauty and not desert sand"  
(Ex. 2-192, Gazette of 6-61, P. 7)

The land was suitable for "commercial agricultural purposes"  
(Ex. 2-1074, newspaper, P. 8 & 17)

The climate and soil resources are "capable of producing a wide range of land, tree and truck crops such as wheat, corn, potatoes, lettuce, onions, apples, apricots and many more on a commercial basis"  
(Ex. 2-1074, newspaper, P. 22)

"The abundant water supply... provides a rich and fertile crop-land for alfalfa, grain, truck farming, and orchards"  
(Ex. 2-19, black & white brochure)

"Rolling-rich valleys of verdant range and meadowland"  
(Ex. 2-19, black & white brochure)

Mark Menke, since 1929 the Elko County Extension Agent with the University of Nevada and U. S. Department of Agriculture, testified the soils in Montello Valley are generally quite alkaline, causing the presence of very little sagebrush and of rabbit brush two to five feet high, indicative of alkaline to alkali conditions; but much of the Valley south of Montello growing shadscale, a dwarf type of plant six inches to two feet tall (R.T. 4986 - 4988). The witness also testified that soil additives to overcome the alkalinity in the valley lands south of Montello would be almost prohibitive from the standpoint of costs and would be prohibitive for horticultural purposes (R.T. 5014, Ex. 1-800).

Witness Menke testified the scale of alkalinity (pH) runs from 0 to 14, with 7 being neutral, that at 9 to 9½ there are eliminated a number of crops susceptible to alkaline conditions, which would be most of the clovers, beans, and most horticultural crops such as fruits including pears and apples (R.T. 4989). Of 13 test of Gamble Ranch soils, one registered pH of 8.1, while 12 registered from pH 9.0 to 9.8 (Ex. 2-1246).

Menke testified that two cuttings of alfalfa per year would be the regular dependable thing, assuming there is irrigation water for two cuttings; that no alfalfa has been grown on the land subdivided and sold, that the average annual production of Elko County is 2-3/4 tons per acre, that on the better lands on Gamble Ranch the production would be a maximum of 4-1/2 tons to 5 tons per acre, down to 2 tons after four to six years of the stand, with an average of 3-1/2 tons (R.T. 5007 - 5010).

Menke testified that the first pre-requisite for commercial agriculture in Elko County is water --- without water no harvested crops can be raised (R.T. 4985), and that he knows of no commercial agriculture land or commercial irrigation well on Gamble Ranch



"An annual crop of 240 tons of alfalfa from 40 acres" (Ex. 2-114, brochure, P. 8, 7th par.)

south of Montello (R.T. 4986). He also testified the growing season at Montello is comparatively short, limiting crops which can be successfully grown to those which will mature in the neighborhood of 120 frost-free days, and that there are seasons when the frost-free period may be even shorter than that (R.T. 5023 - 5024). Frost may occur as late as June 20 and as early as September 1 (R.T. 4992). Menke also testified he knows of no farms or ranches in Elko County of 160 acres or less which procure a living from commercial agriculture (R.T. 4990 - 4991). He also testified that the flat land south of Montello because of high alkalinity would not be suitable for strawberries, raspberries, apples, pears, peaches and things of that sort (R.T. 5013). Crops of that nature could be grown in the alluvial fans "up off the flat portion of the Valley" (R.T. 5014). There are no commercial poultry farms or dairies in Elko County (R.T. 5014).

Clair M. Whitlock, since 1961 the manager of the Elko District, Bureau of Land Management, U. S. Department of the Interior, testified that the vegetation on the land subdivided and sold is such that 160 to 200 acres would be required to sustain one cow for one year (R.T. 5519). He also testified that he classified the Montello Valley as a desert and classified its appearance just prior to May 6, 1965, as "gray" (R.T. 5530).

Postmaster Melva Pearson testified with regard to the plot south of Montello that the Montello town folk "always have called it the desert; everybody does" (R.T. 4960 - 4961). Under cross-examination, Mrs. Pearson was asked if the land does not look "pretty much the same both north of the tracks and south of the tracks". Her reply was, "I guess it does to you. To me it doesn't look the same because I know the country" (R.T. 4978 - 4979).



Postmaster Pearson testified she and her husband have farmed for 20 years Pearson Ranch of 160 acres eight miles east of Montello in a sheltered cove in the foothills. They have 35 acres of hay land planted to oats and alfalfa, and five acres of orchard and garden in which they raise corn, carrots, beets, potatoes and tomatoes sometimes. They are able to raise tomatoes by keeping them covered until the middle of June. In the orchard are the hardy fruits such as pears, peaches and apples and several types of plums and apricots. Their location is about 10 degrees warmer in winter than on the flat below. In some years killing frosts occur every month of the year, or at least nine or ten months of the year, on the average of every second or third year when fruit is killed in blossom. This also occurs to tomatoes and corn. There are a couple of plum trees in Montello that kept fruit on them a couple of times. The Pearson Ranch is above where the old salt lake evidently was, and soil at the Pearson Ranch does not have the alkali content of the flats (R.T. 4951 - 4955).

The promoters in filing with the Securities and Exchange Commission a Registration Statement under the Securities Act of 1933, acknowledged, "The Company has not made any extensive study of soil conditions on the Gamble Ranch, but such information as is presently available indicates that most of the soil on the Company's properties has a gravelly consistency and is not of high quality. There is some evidence of alkali in the soil, which if present in sufficient quantities, might adversely affect the ability of the company and purchasers of the land successfully to develop farming operations thereon (Ex. 1-261, P. 10).

Tests on seven samples of soil removed from one 40-acre subdivided ranch showed the soil is low in organic matter, low and low-medium in the nitrate and phosphate nutrients,







and that it contains some soil salts and some black alkali. Generally, the samples were classified as low in fertility. For the soil to be developed, provisions would have to be made for fair to good drainage and an ample supply of good quality water (Ex. 2-1246; R.T. 9287).

The principals were advised in February of 1961 by competent opinion that much of Gamble Ranch soils are heavily alkaline and too much so for many crops, and that it could cost several hundred dollars per acre to condition the soil (Ex. 2-892-A8; R.T. 3898 - 3900).

The promoters acknowledged in Amendment 1 to the SEC Registration Statement, "In the opinion of the company, the parcels previously sold and those presently available for sale are, in many instances, relatively less desirable from the purchaser's point of view than other more easily accessible and fertile tracts which are not presently being offered for sale." (Ex. 1-415, P. 19).

Having purchased the land in reliance upon the promotional material, much of it colored, the purchasers experienced varying degrees of shock upon visiting the property and finding it to be desert, covered with sagebrush (Examples: R.T. 2327 - 2336, 2449 - 2453, 2686 - 2687, 3031 - 3035, 7539 - 7540, 7746 - 7750, 7862 - 7864, 7929 - 7934, 8041 - 8042).

Fred Harris, a ranching expert, under date of September 1, 1959, furnished to Clejan a letter listing the crops which the climate and soil resources are capable of producing on a commercial basis, which letter was used widely in the promotion until estopped by Harris on September 25, 1961. The letter listed alfalfa, clover, wheat, oats, barley, rye, potatoes, corn, beets, beans, peas, truck crops, store fruit and small fruit. On September 25, 1961, Harris advised J. J. Byrnes, vice president of Gamble Ranch, that



he intended to inform purchaser - inquirers as follows: "The statements made in this letter were not intended to apply to any and all lands Gamble Ranch Investments may choose to sub-divide and sell. My letter was intended to apply only to the agricultural lands of the old Gamble Ranch in the Montello area". Harris in testimony explained this related to the land then in agricultural use (R.T. 2151 - 2155).

## Water

"Water is abundant and easily obtainable"

(Ex. 2-1058 & 2-1059, film strip, Frame 40)

"There are many springs on the ranch"

(Ex. 2-128, color brochure)

"Water comes to the surface and flows through green valleys into several reservoirs"

(Ex. 2-128, color brochure)

"Abounding with springs, wells, streams, sub-surface water deposits, rain and melting mountain snow, irrigation systems on Gamble Ranch are further supplied with water by Thousand Springs Creek, controlled and dammed by three reservoirs"

(Ex. 2-1074, newspaper, P. 6)

"This abundant water supply on Gamble Ranch provides a rich and fertile crop-land"

(Ex. 2-1074, newspaper, P. 6)

"Water is plentiful...this precious commodity is in abundant supply"

(Ex. 2-1074, newspaper, P. 21)

The appellant testified the source material he used in passing on advertising included the book prepared by Previews, Inc., which figured in the sale of the ranch by Stewart to Clejan and his associates. He also testified that Stewart had re-confirmed for him "everything" that was in the book (R.T. 13,062 - 13,063). An entire section in that book is entitled, "Water and Irrigation", and that section is shown to be based on a report filed by a Denver, Colorado, irrigation engineer following a study in May of 1957. The report details the current sources of water irrigating at that time 4,240 acres of crop land and 9,300 acres of meadow land. In discussing potential irrigated lands, including the "winter fat" range (the area being subdivided), the report recommends that a minimum of 25 strategically located test wells be drilled, and that certain other studies be made. In summation, the report states that it should be possible to develop sufficient water to irrigate 14,000 acres of the 600,000 acre "spread", "assuming that test wells substantiate this". The 14,000 acres are represented as 6,000 acres for alfalfa, 6,000 acres of high production irrigated pastures, 1,200 acres for grain, and 800 acres for corn (Ex. 1-1128, P. 25).

To meet requirements of the California Division of Real Estate (R.T. 10,330), the engineering firm of Stetson, Strauss and Dresselhaus in late 1959 was requested to,





"Here are streams, springs, wells, crystal clear reservoirs and lakes... in an area of Nevada that abounds in streams, wells, fertile cropland"  
(Ex. 2-1, radio script, L, M & N)

"There is an abundance of water on Gamble Ranch"  
(Ex. 2-280, radio script, #14)

"Water comes to the surface and flows through green valleys into several reservoirs, through the many springs existing on the ranch"  
(Ex. 2-282, radio script, P. 2)

"Water is in abundance"  
(Ex. 2-1058 & 2-1059, film strip, Frame 40)

"Easily drilled wells bring in plenty of water"  
(Ex. 2-1058 & 2-1059, film strip, Frame 40)

"Water in many areas is just below the surface of the ground"  
(Ex. 2-1058 & 2-1059, film strip, Frame 41)

and did, make a study of the prospects of developing water sufficient for domestic use (R.T. 10,403). The firm filed a 21-page preliminary report, from which was quoted in promotional material only excerpts which would favor the promotion. The report, for example, showed that, "Ground water at the present time is within 8 feet of ground surface in at least two locations in the valley area of the unit", those two being among the stock wells drilled on the Montello desert by the Utah construction company, owner prior to Stewart. In the third of the four stock wells on the desert visited during the field investigation on December 29, 1959, water surface was near 170 feet below ground surface. The report pointed to the "paucity" of data on which to base accurate predictions (Ex. 2-884, P. 1 & 10).

The defendants' witness, Thomas M. Stetson whose firm authored the two water reports submitted to the principals' company, testified under cross-examination that work recommended in the initial report of January 1960 in order to develop additional facts to support statements about water potential, was never accomplished (R.T. 10,411 - 10,413). Stetson also testified the statement, "Water is in abundance. Easily drilled wells bring in plenty of water", is generally true of the Montello unit but that he did not believe it would be true with respect to "everywhere" in the unit such as the areas overlying bedrock (R.T. 10,565 - 10,568). He also testified the statement, "Water in many areas is just below the surface of the ground" is true with regard to the area up near the town of Montello, but not true "as you get further and further south" (R.T. 10,568 - 10,569). Stetson also testified there are no actual streams in the Montello unite itself (R.T. 10,614).





Subsequent letters furnished by the engineering firm to the promoters for attachment to their applications for Public Reports pertaining to the various blocks of subdivided land stated it might become necessary to haul water to areas away from the center of the valley, and placed the prospective cost at \$1.00 to \$2.00 per 100 gallons (Ex. 2-883-EE, 1-184 to 1-200).

Harris testified he found it necessary to order withdrawal of his initial letter by his letter of September 25, 1961, which also informed the vice president of the Gamble Ranch Company that on the lands being subdivided and sold, "Surface irrigation water is non-existent and underground irrigation water is an uncertain quantity". (Ex. 2-1229; R.T. 2154 - 2156).

Stewart testified there were 11 irrigation wells on Gamble Ranch, all producing well except for one which was set crooked; that all were north of the tracks in the northern part of the ranch, that 4,000 acres were under irrigation when he bought the ranch and that he broke out an additional 5,000 acres, but not all of which were put to beneficial use (R.T. 956 - 957). He also testified there were some springs in the mountain areas south of the railroad tracks, but none on the flat land south of the tracks (R.T. 955).

In Amendment No. 1 to the SEC Registration Statement, the Company said, "The company has received reports from its water supply engineers, Stetson, Strauss & Dresselhaus, Inc., indicating that it may not be economically feasible to drill for water upon approximately 126,000 acres of land owned by it on the Gamble Ranch and the California Division of Real Estate has refused to issue a Public Report with respect to approximately 8,500



of said acres unless and until the company is able to present an acceptable plan for the supply of water thereto. Unless the company is able to present such a satisfactory plan, the California Division of Real Estate may likewise refuse to issue a Public Report with respect to the remaining approximately 117,500 affected acres... The problem is presently under study by the company but there is no assurance that the company will be able to devise means for supplying water to these areas... average annual rainfall on the Gamble Ranch is approximately 8-1/2 inches and... it is questionable whether a water supply can be economically developed for substantial portions of the company's properties (Ex. 1-415, P. 5 & 6).

The company drilled or assisted in financing the drilling of four wells south of the railroad tracks. The well brought in at the motel was drilled to a depth of 290 feet and pumped 20 gallons per minute, sufficient for needs of the motel (R.T. 6130 - 6138). An irrigation well about 100 yards east of the motel was drilled to a depth of 420 feet, the static water level was at 172 feet and there was insufficient water to test (Ex. 2-1250-A, R.T. 6513 - 6517). Albert W. Davidson, the principals' representative on the ranch and for whom the well was drilled, testified the well would pump 320 gallons per minute for 20 or 30 minutes and then the water level would drop below the pumping level, requiring a 20 - 30 minute "rest" before pumping resumed (R.T. 3688 - 3689). Another well was drilled about eight miles south of the motel, on subdivided land. This well was 350 feet deep with the static water level at 149 feet. After 1-1/2 hours of test pumping at 446 gallons per minute, the water level had dropped 100 feet (Ex. 2-1250B; R.T. 6517 - 6521). Albert Stancil, the



purchaser on whose land the well was drilled, testified he and his associates returned the 160 acres to Gamble Ranch because the well did not produce the 1600 gallons per minute required to irrigate their holdings (R.T. 5083 - 5085). The Stancil well actually was 610 feet deep, with casing perforated from 350 feet to 610 feet. (Ex. AF, R.T. 4385 - 4386). The fourth well, known as the Patton well, was drilled to a depth of 631 feet, and in test pumping had a drawdown of 175 feet. To the Government's expert witness, the necessary lift of the water and the absence of cultivated fields in the area indicated no economic success of this well in over two years (Ex. AE, R.T. 4386 - 4388).

George B. Maxey, a geohydrologist called as an expert witness by the Government, testified that the Castle Rock Well which on December 29, 1959, assertedly had a depth of seven feet to water, on April 22, or 23, 1965, had a water level of 164 feet; and that Montello Well No. 1, which assertedly had a water level of eight feet on December 29, 1959, was actually dry at 100 feet on April 22 or 23, 1965, 100 feet being the depth of that well (R.T. 4251 - 4253). Dr. Maxey also testified that from the latitude of Montello southward the water level ranges from 50 feet to something over 185 feet, and that northward of Montello water levels are 40 or 50 feet (R.T. 4258 - 4259). He also testified that the statement, "all precipitation goes to sub-surface" is a scientific absurdity (R.T. 4287). The witness also testified there are no springs and no water that comes to the surface and flows into reservoirs in the area known as the Montello Unit, but that such conditions obtain primarily where the reservoirs are constructed north of the railroad tracks (R.T. 4289 - 4290). Dr. Maxey also testified that in his opinion there is no lake or underground body of





water beneath the subdivided land, nor is water in such areas just below the surface of the ground (R.T. 4292 - 4294). He also testified that in his opinion sufficient water could not be obtained from irrigation wells to irrigate 40,000 acres of alfalfa in the Montello Valley (R.T. 4296 - 4300).

Menke testified the cost of drilling a well on Gamble Ranch generally is one dollar per foot per inch of casing diameter, or \$16 a foot for a 16-inch irrigation well, and that equipping such a well with pump and engine could run from \$3,000 to \$15,000 or more (R.T. 4994).

### Electricity and Television

"Electricity and power are in, ready to be used today - not tomorrow"

(Ex. 2-819A, 2nd Par.)

"Electricity is here"

(Ex. 2-1058 & 2-1059, film strip, Frame 43)

"Ample electricity to serve residential and farming needs is supplied to the Ranch by the Rural Electrification Administration"

(Ex. 2-114, brochure, P. 8)

"Reception is bright and clear"

(Ex. 2-1058 & 2-1059, film strip, Frame 41)

Witness Stewart testified that during his ownership of Gamble Ranch, he deposited \$37,000 to help defray the expense of running the Raft River electric cooperative power line from Lucin, Utah, to the Gamble property for the principal purpose of running irrigation pumps, but that the supply was inadequate to run all the pumps and the mill at the same time (R.T. 893).

On January 22, 1960, Raft River wrote Reisman, "Assuming that one half of the land were to be irrigated and with a ranch type consumer on each one 40-acre parcel, a thumbnail estimate of the cost of serving the project with power would be \$1,500,000.00 (Ex. 2-1248). Raft River did extend the power line to the motel, about six miles south of Montello, but nowhere else (Ex. 2-1249; R.T. 5231 - 5232).

Edwin T. Schlender, manager of Raft River, testified his company informed the promoters they would have to guarantee an annual return of revenue equal to 12 percent of the cost of construction necessary to serve new customers (R.T. 5235). A guaranteed revenue agreement with the promoters never materialized (R.T. 5225).



Purchaser Albert Stancil testified Raft River would have charged him about \$10,000 to bring electricity to his parcel from the motel, eight miles away (R.T. 5089, 5091 - 5092).

Postal Inspector Jacobson testified that at about 4:30 p.m. on May 24, 1962, a modern television set in the home of a Montello resident brought in only one station on one channel, from Salt Lake City, and that the picture was very snowy to the point he could hardly make out the picture (R.T. 9109 - 9110).

## Climate

"Winters are generally mild"  
(Ex. 2-1074, newspaper, P. 21)

"Winters... are generally  
mild and comfortable"  
(Ex. 2-19, black & white  
brochure)

"The valley is sheltered  
from violent storms and wind  
by the surrounding mountains"  
(Ex. 2-1058 & 2-1059, film  
strip, Frame 42)

"The Montello valley has no  
serious agricultural hazards  
such as hail, violent winds,  
torrential rains, floods, and  
dust storms"  
(Ex. 2-4, Harris letter)

Postmaster Pearson testified about eight or nine inches of snow fell on or about June 11, 1964, that snow cuts communications with the outside from Montello, and that it has been necessary to airlift in food for cattle because of the snow (R.T. 4955 - 4956). She also testified cloudbursts occur several times in the summertime, washing out roads; that in the Montello area she has witnessed dust storms, winds sufficiently high to fell a tree and television antenna, and hailstorms, some causing loss of garden crops and alfalfa (R.T. 4956 - 4958).

Stewart testified that blizzards occur in the springtime (R.T. 896).

Harold D. Scott, the Montello observer for the U. S. Weather Bureau, testified the temperature dropped to 32 degrees or below in every month in 1959, in 11 months in 1960, nine months in 1961, 11 months in 1962, and in eight months in 1963 (R.T. 4920) that the extreme minimum temperature from 1959 to 1963 was minus 32 degrees recorded in 1963 (R.T. - 4921), that the mean maximum temperature in January is somewhere between 34 and 36 degrees and the mean minimum temperature for January is 12 degrees (R.T. 4931).



## Development

The Gamble Ranch subdivision is being rapidly developed (Ex. 2-1058 & 2-1059, film strip, Frame 15)

The Gamble Ranch subdivision "has become one of the largest, most exciting land development programs in the history of America" (Ex. 2-2-D, radio script)

"The gigantic Gamble Ranch development (is) already bursting at the seams with growth and activity" (Ex. 2-287V & 2-1059, film strip, Frame 23)

"We stand solidified and with the internal strength, vision and wealth to carry out our projected program" (Ex. 2-819A, P. 2)

"Each Gamble Ranch land purchaser is entitled to a Founder Membership in the new Gamble Ranch Club" (Ex. 2-128, color brochure)

"A beautiful ranch style club house is being planned, immediately adjacent to the new motel, restaurant and cocktail lounge" (Ex. 2-128, color brochure)

Gamble Ranch had surveyed and staked each parcel and constructed an access road thereto (Ex. 20-A, P. 2, Gazette 5-1-60)

Norman T. Rockel, General Manager of the companies successively promoting and selling Gamble Ranch, testified that at the end of December 1961 there was a minus cash availability of \$468,000.00, representing a deficiency in available cash for the various items planned and programmed, and that the projection was for a deficiency of \$902,000.00 at the end of 1963 (R.T. 5333 - 5334).

Blackwell testified that except for the motel and restaurant there were no other facilities constructed on the land being sold (R.T. 6156). He wrote to Byrnes at the Gamble Ranch office on April 3, 1962, "The office and Gazette have made a lot of promises but to date nothing was done except what was done by my family" (Ex. 2-690; R.T. 6157).

Davidson testified that a program to plant trees on the subdivided land ended when rabbits and cattle consumed the thousand to 1500 trees and because of the inadequate supply of water (R.T. 3510 - 3515), and that company officials had felt the cost of surrounding each tree with wire mesh was not justified (R.T. 3514).

W. H. Settlemyer, the surveyor hired by the company, testified he established only the section corners and quarters in some townships, that he never established the boundaries of any individual parcel of 40 acres or less, and that he ceased all surveying when the company failed to pay him (R.T. 5106 5109).

Blackwell testified the directional signs were section signs denoting four corners of a section, that they were erected only in certain areas where property owners could enter by road (R.T. 6173 - 6174).

Ray Blackwell and Albert W. Davidson, the promoters' representatives on the Gamble Ranch site, testified that "roads" on the subdivided





"With the access roads being in and these easy-to-read yellow directional signs being installed, it will be an easy task for each property owner to locate his property" (Ex. 2-204-A, Gazette 5-1-60)

"The Institute for Essential Housing... has available for qualified buyers a program of 100% home construction financing" (Ex. 2-178, Gazette, P. 4)

The Gamble Ranch development had the approval of the Government of the State of Nevada (Ex. 2-19, black & white brochure)

"Negotiations are currently being conducted with several industrial firms with respect to possible locations on the ranch under our Industrial Subsidization Program" (Ex. 2-191, Gazette, P. 1)

"To insure the rapid but orderly development of Gamble Ranch, no expense was spared. The world famous architectural firm, Victor Gruen Associates, have submitted master plans for suggested new communities within the ranch. Only after intensive research on the area did Gruen's expert staff submit their plans. A suggested new city, civic center, planned shopping centers to rise on the ranch" (Ex. 2-1058 & 2-1059, film strip, Frames 20 - 24)

land represented paths made by one pass of a road grader and that they needed constant re-grading to repair damage caused by flash flood and to scoop aside the powdery soil (R.T. 6142, 6166, and 3685).

The announced model home was never constructed (Ex. 2-204-A, Gazette of 4-1-60; R.T. 6168 - 6169).

The "new Montello lumberyard" had lumber available during construction of the motel but nobody ever offered to buy any lumber and the building housing the business burned down (Ex. 2-204-A, Gazette of 4-1-60; R.T. 6123 - 6124 and 6169).

Blackwell testified the Gamble Ranch Club house was never built (R.T. 6194 - 6195).

Clark testified the principals never authorized money for the development projects including the building of a club house, archery facilities, tennis facilities, badminton, oval track, skeet shooting, golf range and ski lift (R.T. 4114 - 4115).

Harold F. Ellwood, a purchaser with some farming experience, testified he entered into negotiations with company officials to establish a farm on his property with financial aid from the company, to the extent of \$10,000 initially for a well and farm equipment (R.T. 2886 - 2889). He also testified he established residence on his property in a house trailer, but left after 30 days when no financial assistance was forthcoming (R.T. 2891 - 2900)

G. L. Dirksen, Southwest district manager for the Institute for Essential Housing, testified that property owners desiring to build a home under the IEH program must be able to present a first deed of trust (R.T. 7993), that IEH had a secondary program under control of Universal CII whereby if equity in the land was sufficient in the eyes of the appraisal department



"Industry is being coaxed because of the favorable labor pool existing here" (Ex. 2-128, color brochure)

of Universal, IEH would finance the balance of the land with  $7\frac{1}{2}\%$  down (R.T. 8006), but that the program never functioned in the Southwest district because Universal CII would not appraise equity in outlying areas (R.T. 8011). He also testified no applications for IEH financing were received from individual purchasers (R.T. 7998), or from the company (R.T. 8006).

Governor Sawyer testified he was never told his letter (Ex. 2-853 - 854) would be used in advertising or promotional material and that he never authorized such a use (R.T. 1550 - 1551). On July 14, 1961, Governor Sawyer wrote to Gamble Ranch, stating he had not endorsed the project in 1959 and did not endorse it on date of the latest letter (Ex. 2-1227; R.T. 1576).

Rockel testified there was no cash available from 1961 to 1964 to finance the industrial subsidization program (R.T. 5340 - 5341). As of September 27, 1961 the company acknowledged no manufacturing operations were being conducted on Gamble Ranch and that the company had not found an acceptable person or firm desiring to commence operations on the ranch and which it would be willing to subsidize (Ex. 1-261, P. 11).

Frank E. Hotchkiss, city planner and architect employed by Victor Gruen Associates, testified that in response to an accepted proposal submitted by his firm, schematic plans were prepared for a possible townsite and a small commercial center in the Montello area of Gamble Ranch (R.T. 1793 - 1798). He also testified his firm gave only preliminary advice to the promoters, that his firm did not spend a lot of time on the project and that its personnel did



not visit the ranch because the promoters never authorized the expense of travel (R.T. 1800 and 1908). Hotchkiss also testified Victor Gruen preliminarily advised the promoters that their method of selling 10, 20 and 40 acre parcels was inadvisable because they were too small for farming but too big for efficient development of utilities, roads and community services, that alternative methods of selling reshaped parcels were suggested and that Gruen's services terminated on April 15, 1960 (R.T. 1799 - 1801). Aldo Genova, architect associated with Victor Gruen, testified the Gruen sketches did not constitute a master plan but were merely preliminary plans leading to further study (R.T. 1927 - 1928).

#### Investment

"This is your ~~once~~-in-a-lifetime opportunity to invest in ranchland at a fraction of its eventual worth"  
(Ex. 2-19, black & white brochure)

"Your working investment in Gamble Ranch will bring you comfortable returns"  
(Ex. 2-1074, newspaper, P. 6)

"This is valuable ranchland that offers you security"  
(Ex. 2-19, black & white brochure)

(Gamble Ranch land)"is a solid investment"  
(Ex. 2-1-E, radio audio)

(Gamble Ranch land is) "a sound, solid investment in land"  
(Ex. 2-2-W, TV audio)

Stewart testified the selling price to Clejan of two and a half million dollars, represent a cost per acre of ten dollars and some odd cents, spread over every acre including improvements (R.T. 904).

The promoters sold the subdivided land at rates of \$3,000 to \$4,000 for 40 acres, \$1990 for 10 acres, and \$795 for 2½ acres (Ex. 2-19 to 2-41).

Gerald F. Trescartes of Elko, Nevada, called as the Government's expert appraiser, testified the highest and best use for Gamble Ranch land was for a large livestock operation, then applying to comparable sales in the area the carrying capacity of ranch land (animal units) the value of Gamble Ranch is placed at \$2,271.67, averaging out to \$10.33 an acre, including improvements, range rights, water rights and real estate (R.T. 6724 - 6727). He also testified he placed a value of \$10.00 per acre on subdivided Gamble Ranch land south of Montel based on comparable sales (R.T. 6733), that





(Gamble Ranch land) "boasts an investment potential unequalled anywhere in the west"

(Ex. 2-10

"A profit potential second to none"

(Ex. 2-1058 & 2-1059, film strip, Frame 51)

(The sale of Gamble Ranch land is) "not a real estate promotion"

(Ex. 2-1074, newspaper, P. 6)

"This land is not to be sold on a typical 'subdivision' basis. You will find there are no gimmicks or false promises"

(Ex. 2-1074, newspaper, P. 24)

the accepted practice of real estate appraisal is to try to find the highest and best use for the land as a basis for appraisal (R.T. 6761), and that the fact the promoters of Gamble Ranch cut up a large piece of range land and sold it in small pieces would not increase the value in any fashion (R.T. 6763).

Elwood testified that at Rockel's direction he visited the Department of Agriculture in Reno to seek a loan for purposes of farming his subdivided land, and that he reported back to Rockel that the agency would not lend money on that land at all and questioned his interest in farming such land when he could buy land equal to it for 50 cents an acre (R.T. 2891 - 2892).

Donald E. Jacobson, manager of the Wells, Nevada, branch of the First National Bank of Nevada, testified his firm informed the promoters it would be unable to lend them money on accounts receivable because their type of operation is a speculative one (R.T. 4134).

Albert Williams, Vice President of the Nevada Bank of Commerce, testified his bank would not lend money to an individual wishing to pledge as primary collateral land south of Montello, and that it would not be an economical unit to make a loan on a small tract of that type of land (R.T. 4142).

## 8. Montello, Nevada

"...city ... an established community of homes, shops, restaurants, motels, schools (including a major high school)"  
(Ex. 2-128, color brochure)

(Montello has) "all normal shopping facilities"  
(Ex. 2-128, color brochure)

Postmaster Pearson testified the town of Montello had dwindled in size from about 600 persons in 1941 to about 60 families in 1959 to 1963 in a radius of 35 miles, that in Montello from 1959 to 1963 there were a cafe and bar, a bar, a general store, a service station-garage, the post office, the railroad station, and a Standard Oil bulk plant, and nothing else (R.T. 4943 - 4950). She also



(Montello is ) "small but already feeling the surge of expansion"

(Ex. 2-1058 & 2-1059, film strip, Frame 33)

"Living accommodations for personnel can be provided from rentals in the town of Montello"

(Ex. 2-819A, P. 2)

"An adequate Labor Pool is also readily available"

(Ex. 2-819A, P. 2)

"The town of Montello is... installing an improved water system"

(Ex. 2-195, P. 2)

0. Pictorial Promotional Material

The pictures in Gamble Ranch advertising material depicting green fields, flowing streams, and stands of trees were pictures of the land being subdivided and offered for sale.

(Ex. 2-1074, newspaper, P. 17 & 31; Ex. 2-1058 & 2-1059)

0. California Division of Real Estate

(The order prohibiting further sales of Gamble Ranch land in California) "has in no way affected the continued development of the ranch"

(Ex. 14, Ross letter to purchaser Burt)

testified the high school portion of the one school closed and students thereafter had to travel 106 miles, round trip, to Wells (R.T. 4950 - 4951). Mrs. Pearson also testified there were quite a few unoccupied homes in Montello, that some had not been in livable condition for some time, and that only one or two of them were in livable condition (R.T. 4968).

Mrs. Pearson testified that since years ago Montello residents have obtained their water from the Southern Pacific pipeline (R.T. 4948 - 4949).

Robert Ellis, whose Pace Productions produced the film strip, testified the land south of Montello flattens out into a plain with sagebrush on it and that is all (R.T. 2138), and that none of the film strip pictures are photographs thereof except perhaps the last two taken at sunset (R.T. 2088 - 2102). He also testified that the picnic scenes by streams were photographed near Crittenden Reservoir (R.T. 2093).

On July 16, 1962, the California Real Estate Commission filed an "Order to Desist and Refrain" from further sales of Gamble Ranch land in California (Ex. 1-1125). Robert Stein sales manager, testified he signed the accompanying "consent agreement" at Byrnes' behest (R.T. 4848 - 4851), and John W. Carey testified



"There is not one word in the order issued by the Real Estate Commissioner indicating any wrongdoing or misrepresentation by the company"  
(Ex. 15, Ross letter to purchaser Burton)

(The said order contains) no admissions of fraud or wrongdoing"  
(Ex. 17 & 41, Ross letters to purchasers Dykeman & Mc Eachern)

"The company withdrew its land for sale to California residents on a voluntary basis and has not at any time been charged with fraud or misrepresentations"  
(Ex. 39 & 66, Ross letters to purchasers Loswick & Rogers)

he was made an officer for the specific purpose of signing the document as "President" (R.T. 6255 - 6256).

The Order states that the company and all persons named, agree and consent "that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 11019 of the Business and Professions Code and for the making of the Order hereinafter set forth pursuant to such section, exist. The accompanying "consent agreement" contains an almost identical provision (Ex. 1-1125).

On August 2, 1962, the California Real Estate Commission filed against the company an "Accusation" (Ex. 1-1124), charging it and its officers, directors and stockholders with conspiring to misrepresent Gamble Ranch land in sales to purchasers, and listing numerous representations in sales material which were fraudulent, false and untrue (R.T. 6272 - 6282).





APPENDIX F

Complaint Letter from File of Loswick

(Ex. 3-488)



San Francisco, Calif.  
2231 - 19 ave. July 18, 1962

Pacific West. States Land Development  
Corp. of Nevada, Gamble Ranch.

3330 Geary Blvd.

San Francisco, Calif.

Dear Mr. Wise:

According to News report from  
the California Real Estate Commission,  
Mr. Wayne A. Savage, my long  
standing fears of your Company's  
misrepresentation, and outright  
fraud, has been well founded.  
On advice of my attorney, I have  
by serve notice, that I will  
institute Court proceedings against



you. You not only to recover  
and sent my wife and I  
have paid you, on this worthless  
bond, but also include a large  
suit also, if your Company do  
not get out of the  
money paid you. That you  
and your Company paid as this  
to the old pharos, like my  
self and my wife, who have  
been for a long time, is to  
be my satisfaction. The  
went into this land, on the strength  
of our confidence in you  
Mr. Rosenberg, and I have  
now that you are all a bunch  
of scoundrels and traitors to your  
words and promises. I have  
nothing left of my money,  
and am now in a very bad  
state.





I have your receipts  
of accepting from me,  
\$ 404.68 which

monies - Now I  
shall expect you to  
return to me forth-  
with! Otherwise I  
shall institute suit against  
you immediately.

A. Waller Rosworsky.



APPENDIX G

Complaint Letter from Tex Munson

(Ex. 3-1335)



155 S. Sultana Avenue  
Ontario, California  
31 October, 1961

Gamble Ranch Investment Corp.  
9412 Wilshire Boulevard  
Beverly Hills, California

Dear Mr. Alan Scale:

I am sorry that I have to write this letter to you. I have been up to Gamble Ranch recently and am very deeply disappointed with what I saw. You had told me of the roads that were in, the water skiing facilities and that the property was staked out and none of this was true. The property was pointed out to me as being approximately there but no property stakes. The only power lines were those that were available for the restaurant and those people lines there.

I have discussed this with some friends of mine before I bought the land.





it will and myself feel happy that this  
was misrepresentation on your behalf to make  
this purchase therefore I wish to cancel  
my Contract with your Org and would like  
a refund on the down payment and there-  
fund if the monthly payments made to date.

In advance I am thank you and re-  
main.

Sincerely,  
[Signature]

Steph [Signature]



APPENDIX H

Governor Sawyer's Complaint Letter

(Ex. 2-854-B; 2-1227)



July 14, 1961

*Pending*  
*7/26/61*

Mr. Arnold Clejan  
9412 Wilshire Boulevard  
Beverly Hills, California

Dear Mr. Clejan:

You will recall that in September of 1959, I called your attention to the fact that you were using a form letter which you had received from me relative to the Gamble Ranch property promotion in newspaper advertising and in your brochure and other ways which were totally and completely distorted and unacceptable to me. At that time, I pointed out to you that my letter did not constitute an endorsement and that it was being used improperly and in an unauthorized manner. I was later assured by you that the letter would not be used again.

I am advised now that a Mr. Ray Asin in your office, at the above address, uses my name frequently in his sales pitch; that you have an enlargement of my letter on the wall; that in a colored slide presentation my letter is quoted in full; that it is stated that I had endorsed the project 100% and that it would be political suicide if this were not true; that the Gamble people were conferring with me regarding a multi-million dollar gaming establishment and had my assurance that such would become a reality.

I have looked over your new brochure and I am advised that not only some of the material there, but also some of the statements made in your letters are, in all likelihood, untrue and misleading.

I am further advised that Mr. Ralph Weiss, 3330 Geary Boulevard, San Francisco 18, California, is following much the same procedure as described in your Los Angeles office; further, that he is making a number of statements that are untrue and misleading regarding the availability of water, population of the towns, the type of soil, availability of power, and the tax structure in the State of Nevada.





Mr. Arnold Clejan  
#2, July 14, 1961

In the light of all of the above matters, I am convinced that a thorough and complete investigation should be made of this operation. Since you are assuming that my letter constitutes an endorsement, I am requesting now that you return the original letter. I am also advising you that neither you, nor your agents, nor your brokers, should use my name or refer to the letter in any respect. Assuming that at any time I had endorsed this project, which I did not, I hereby advise you that I do not endorse it now; that I have grave doubts concerning it and that any statements or representations to the contrary will be considered as false and misleading.

You may recall that I have a copy of a letter to you from Mr. Keith Williams, your then attorney, under date of September 14, 1959, in which he sets out very clearly my position and relates a conversation he had with you concerning the matter, a portion of which reads as follows: "you would definitely not put the letter to any use contrary to the express wishes of Governor Sawyer."

I advise you that if there is any further use made of my name, or the use of the name of any other representative of the State of Nevada, including that of Mr. Jack Lehman, or any further use of the letter, that I shall take whatever steps are necessary to properly advise the people of California as to the situation.

In the meantime, I am hopeful that a complete and thorough investigation will be made of this entire matter.

Very truly yours,

Grant Sawyer  
Governor

GS:hmm

CC to: Mr. Gerald J. McBride, Secretary  
Nevada Real Estate Commission, Carson City

Mr. Ray Asin, 9412 Wilshire Boulevard, Beverly Hills

Mr. Ralph Weiss, 3330 Geary Boulevard, San Francisco 18

The Honorable W. A. Savage, Commissioner, Division of Real Estate  
Room 8003, State Building No. 2, First & Broadway, Los Angeles

BCC to Mr. Chris Sheerin, Elko Free Press, Elko  
Mr. Warren Monroe, Elko Independent  
Mr. Charlie Triplett, Wells Progress, Wells  
Mr. Jack Lehman, Director, Economic Development



No. 21782 and 21782-A

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOSEPH J. BYRNES,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

Appeal From the United States District Court,  
Central District of California.

---

REPLY BRIEF OF APPELLANT BYRNES.

---

BUCHALTER, NEMER, FIELDS & SAVITCH,  
EARL P. WILLENS,

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Los Angeles, Calif. 90017,

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*Joseph J. Byrnes.*

FILED

MAR 5 1968

WM. B. LUCK, CLERK



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## REPLY BRIEF OF APPELLANT BYRNES.

---

### Preliminary Statement.

By Order of this Court dated December 29, 1967, the Appellant's Opening Brief filed by the Appellant Samuel Reisman is also to be considered in support of the Appeal of Appellant Joseph J. Byrnes. Appellant Byrnes, through his counsel, Earl P. Willens, has read and considered the Appellee's Brief and the Reply Brief of Appellant Samuel Reisman. Appellant Byrnes does hereby adopt *in toto* the Reply Brief of Appellant Reisman and desires this Court to consider said Brief in support of the Appeal of Joseph J. Byrnes.

However, since certain statements contained in Appellee's Brief pertain solely to Byrnes, the same have not been replied to by Appellant Reisman. It is therefore the intention of Appellant Byrnes by the filing of this Reply Brief to supplement the Reisman Brief by pointing out to the Court what Appellant Byrnes considers to be inaccurate references to the record as they pertain to him and to supplement certain of the arguments made by Appellant Reisman as they pertain to the receipt by the Trial Court of "complaint letters." The arguments raised by Appellant Byrnes are indexed under the same subtopical arguments as were used by Appellant Reisman.

## ARGUMENT.

### I.

THE IMPROPER ADMISSION IN EVIDENCE OF COMPLAINT LETTERS, AND THE COURT'S ERRONEOUS INSTRUCTIONS CONCERNING THE PURPOSE FOR THEIR ADMISSION, CONSTITUTE REVERSIBLE ERROR.

- (1) The Court Did Not Make the Necessary Preliminary Determination That Appellant Had Actual, Personal Knowledge of Complaint Letters. (Reisman's Reply Brief pages 4-5.)
- (2) The Evidence Is Insufficient to Show That Appellant Byrnes Had Actual, Personal Knowledge of the Complaint Letters.

As in the case of Appellant Reisman, none of the complaint letters were addressed to Byrnes. There is no evidence that any of the complaint letters received in evidence were seen by him. The Government does not and cannot point to one shred of evidence in the record to support its claim: "the evidence that Appellants had personal knowledge of complaints is overwhelming and undisputed." (Govt. Br. p. 52).

The Government makes no attempt to tie a specific complaint letter to Byrnes in terms of Byrnes actually viewing such letter. Rather, the Government attempts the "broad brush" approach rejected in the *Phillips* case (*Phillips v. United States*, 356 F. 2d 297 (9th Cir. 1965)). Even at that, the Government distorts the testimony concerning complaint letters in its attempt to connect Byrnes. For example, the government says that Company policy dictated that Rockel (a general manager), after making an initial determination con-

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## ARGUMENT.

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cerning a complaining customer, would then automatically discuss the complaint with Reisman, Benaron and Byrnes (Gov't Br. p. 53). Such is not the state of the record. Rockel testified that upon receiving a complaint he would talk to the complaining customer and the sales person involved and would at times discuss the situation with the sales manager. He stated that from time to time he would discuss a complaint with Benaron and Reisman or other principals in the Company [R. T. 5504-5508]. There is *no* attempt by the Government to tie any specific complaint so reviewed by Mr. Rockel and possibly discussed with a principal in the Company with any of the hundreds of complaint letters received in evidence.

The next attempt by the Government to tie Byrnes, personally, into any complaint letters is the statement that "Byrnes was also advised of purchaser complaints of misrepresentation", citing the testimony of Mr. Stein in support thereof (Gov't Br. pp. 53-54). The fact that such an assertion is typical of the Government's over-reaching, both in its brief and in its conduct during the course of the long trial below, is graphically demonstrated when one analyzes the testimony relied upon by the Government to support its assertion. While Mr. Stein was on the stand, the Prosecutor offered Government Exhibit 3-397, a refund file which the Court admitted, as it had been doing throughout the entire trial, simply because it was a record of Gamble Ranch [R. T. 4813-4814]. This file contained, among numerous papers, a letter from the manager of the San Diego office of Gamble Ranch to Mr. Stein. Therein the manager stated that since he had saved a sale, he wanted the sales-commission instead of giving it to the



original salesman involved. He instructed Stein to so advise Byrnes. The following colloquy took place between the Prosecutor and Mr. Stein:

“Q. [Mr. Nissen] Mr. Stein, did you let Mr. Byrnes know about that?” [The letter from San Diego]. “A. [The Witness] I assume I did. I know that I passed it on. I don’t know if I passed it directly to Mr. Byrnes or to Mr. Rockel. Who ever was in charge at the time, I would pass it on to.

It says here ‘Let Mr. Byrnes know about this’.

I don’t know whether I would have brought it directly to him or not.

Q. You don’t recall it at this stage? A. No, I just don’t today sir, I am sorry.” [R. T. 4813-4814].

Byrnes himself denied ever seeing the memorandum [R. T. 12871]. Thus even the Government’s search of the transcript comes up with nothing better to connect Byrnes with any knowledge of complaints in general than testimony which equally supports the inference that Byrnes never heard of the entire episode referred to in Exhibit 3-397.

Appellant Reisman attacks a similar weakness in the Government’s position when he refers to the Government’s attempt to show that Reisman had personal knowledge of complaints because he “kept in touch” with Nevada attorney McDonald (Reisman’s Reply Br. pp. 6-7). This same artifice is attempted by the Government against Byrnes, and Reisman’s statements relating thereto are equally applicable to Byrnes.

Further, the Government claims that Byrnes had personal knowledge of complaints because copies of attor-

ney Ross' letters in response to complaint letters were available to Byrnes in the Company office (Gov't Br. p. 54). The *Phillips* case disposes of this argument when it rejected the "availability" evidence as being insufficient to impute knowledge. One need only consider the tens of thousands of pieces of paper introduced into evidence as being "the records of Gamble Ranch" to appreciate the absurdity of arguing that Byrnes or Reisman would have knowledge of an individual piece of paper solely because it reposed in one of several filing cabinets in the Gamble Ranch office.

Not content with this availability argument, the Government goes on to insinuate that Byrnes was aware of complaint letters because attorney Ross' letters to complainers contained information which Ross obtained from Byrnes (Gov't Br. p. 54). The Government conveniently ignores the following testimony offered by Mr. Ross: "... as far as Mr. Byrnes having anything to do with these refund letters, he didn't have anything to do with them. He may have been the source of some specific information in the office I wanted." [R. T. 11648]. In fact, this specific information did not relate to any particular refund or complaint letter but was just information about the Ranch in general [R. T. 11650-11651].

In conclusion, the Government ignores the facts in the record when it argues that Byrnes had actual personal knowledge of all the complaint letters admitted against him. The Government's brief discloses no letter personally reviewed by Byrnes nor any which Byrnes personally had knowledge. The admission of these hundreds of letters against Byrnes is so prejudicial as to require reversal.

**(3) The Court's Erroneous Instructions Regarding Complaint Letters Require Reversal. (See Reisman Reply Brief pages 9-14.)**

Reisman's opening and reply briefs correctly point out that the Government offered complaint letters for one purpose only: to prove that someone in the Company knew of the complaints and that therefore the defendants had criminal intent (See Reisman's Opening Brief pages 29-36; Reply Brief pages 9-14). In addition to the record referred to by Reisman demonstrating the Prosecutor's position, which was re-emphasized throughout the trial, Byrnes notes the following colloquys between the Court and Prosecutor during the Prosecutor's case:

"Mr. Nissen: We have a case that says the complaints brought to the attention of defendants are admissible for certain purposes.

The Court: There is no question about that. No question about that.

Mr. Nissen: *Bearing on the question of good faith.*

The Court: No question about that." [R. T. 5839] (Emphasis added).

And later, the Court, at the conclusion of the government's case, questioned the Prosecutor about his use of complaint letters. The Prosecutor in order to reassure the Court and to reemphasize to the jury the purpose for which these letters were offered, stated:

But the files are the cancellation or complaint or whatever you want to call them.

The Court: What are you offering them for?

Mr. Nissen: The complaint letters are offered with the purpose of showing these matters were brought to the *Company's attention*. The answers of the Company—(emphasis added)

...

The Court: Any complaint letters, when the witness is not on the stand, and will not take the stand are offered only to show that information came to the attention of the Company.

Mr. Nissen: Yes sir.

The Court: Just so the jury understands.”  
[R. T. 9050].

Thus the purpose of the Government's use of these letters was made crystal clear both to the Court and to the jury. They were used solely in an attempt to prove criminal intent through constructive receipt of the complaint letters. A practice condemned by this Court in the *Phillips* case.

**(4) Appellant Repeatedly Objected to Complaint Letters Offered in Evidence (Reisman's Reply Brief pp. 14-20.)**

Byrnes commenced objecting to the carload amounts of paper being placed in evidence by the prosecutor almost from the very day the trial began. But right from the trial's start the Court was not interested in Byrnes objections so long as the prosecutor established that the paper was from Gamble Ranch files [R. T. 979].

On the second or third trial day the Court after Byrnes had again objected to the relevance of these papers questioned Nissen, who replied:

“... they all have relevance to a degree and to sort them out and take them apart ...

(The Court) What do you mean they all have relevance to a degree?

Nissen: They do, they all have relevance. All of these documents are company files of the Gamble Ranch" [R. T. 1195].

Upon such an explanation, the Court admitted the document under consideration where the objection was made, and thousands more for the same reason.

The Government was permitted to establish its case against Byrnes without following the basic evidentiary rules of relevancy, materiality or hearsay. Of the thousands of documents received in evidence, perhaps ten per-cent would be properly admitted if the court had correctly applied the Business Records Exception (28 U.S.C. §1732). Once the crack in the door occurred, Byrnes was helpless to avoid the flood of documents. Further objection was futile. Byrnes objections, however, and those of the other defendants preserved their right to have this Court review the objections and the prejudicial error which resulted.

**(5) The Erroneous Admission of Complaint Letters and the Court's Instructions Concerning the Purpose of Their Admission Constituted Plain Error.**

Appellant Reisman's Reply Brief cites the pertinent authority for the proposition that, although the Appellants may not have precisely framed objections to the "complaint evidence," where the admission of such evidence amounts to an unfair trial, this Court will consider the propriety of the admission of such evidence (Reisman's Reply Brief, pp. 20-28).

And, while Appellant Reisman's Opening Brief, adopted by Appellant Byrnes, makes several references to the complaint letters admitted and does quote from portions thereof (Appellant's Opening Brief, pages 23; 38-42; Appendices A and C), the tactic of the Prosecutor in his use of these complaint letters cannot be over-emphasized. The tactic was deliberate, diabolical and effective. This was not a case where the Prosecutor selected a few files at random and quoted therefrom to a jury. Rather, the Prosecutor laid a very clever path with these complaint letters calculated to incite the jury's wrath against Byrnes throughout the almost two months the Prosecutor presented his case.

The trial was not two days old when the Prosecutor began laying the groundwork for his use of complaint letters. He began by introducing Gamble Ranch files in wholesale lots on the theory that such were relevant as being Company files of the Gamble Ranch [R. T. 1195]. The files were offered and read, sometimes with reference to a witness on the stand [R. T. 4813-4814], but more often not [R. T. 5890-5891; 9041-9071].

In order to portray the highly prejudicial effect on the trial through such use of the complaint letters by the Prosecutor, it is necessary to amplify on the prosecutor's use of such letters. This use is most graphic at the very closing stages of the Prosecutor's case when on May 27, 1965, after seven weeks of testimony, after thousands of Exhibits had been received in evidence, and after the pattern for the admissibility of complaint letters had long been established, the Prosecutor advises the Court of his intention to read from several complaint letters. These complaint letters were from per-



sons not present in Court, nor had they previously been called as witnesses by the Prosecution; and their introduction rested solely upon the business records exception without a preliminary finding by the Court that Byrnes or any of the defendants had personal knowledge of these letters.

Preliminary to his reading of these letters the prosecutor states to the Court that he has some matters to read, that he would follow the procedure of merely stating the number of the file, representing to the Court that the files were Gamble Ranch files. The Court, upon having advised that they were complaints that came from the Gamble Ranch file, admitted them in evidence based solely on their having come from said Gamble Ranch files [R. T. 6049-6050].

Mr. Nissen then proceeds to read complaints of misrepresentation by various purchasers. In connection with each such complaint he reads the answer of Bert Ross, who was an independent attorney hired by the Company to process these complaints (See appellant Reisman's Opening Br. pp. 24-26). Ross, in some cases, agreed to a refund and in other cases he would write the purchaser and state that there was no refund due. The complaints in certain instances were similar and the Prosecutor was obviously asking the jury to infer that Ross had no particular standard for making any refund [R. T. pp. 9051-9057 and Exs. 3-1793; 3-1797; 3-1826; 3-1833]. Byrnes had no actual knowledge of either the complaint or the answer sent by Ross.

After reading the above series, Nissen then picks Exhibit 3-1836, a letter of October 31, 1962 suit from John Carey to Bert Ross, asking Ross to hold down cash refunds. There was no showing that Byrnes

had any knowledge that this letter was sent nor was there any evidence that it was sent pursuant to Byrnes' directions. Immediately after reading the aforesaid letter the Prosecutor then reads a letter from Ross to a purchaser dated November 13, 1962 where Ross rejects the request for refund [R. T. 9057-9058]. Apparently the inference that the Prosecutor wanted the jury to draw was that Ross was not acting independently but was now rejecting a refund request pursuant to the letter from Mr. Carey.

The Prosecutor's approach is further exemplified when he reads from Exhibit 3-1890 containing a letter of October 24, 1962 from a purchaser to an employee of Gamble Ranch living *at the Ranch* stating that various representations made by a saleslady were false. Neither the complaining witness nor the saleslady was ever called as witnesses for the Prosecution.

Although the defense knew the Court's disposition to allow this type of presentation, its obvious and damaging effect prompted the defendants to once again object to this type of procedure and the admission of this evidence. The Court however only noted for the record the continuing general objection made by the defendants to this type of procedure [R. T. 9063-9064].

Byrnes had been basing his defense upon his own good faith. The public report of the Division of Real Estate of the State of California, which was required to be shown to each purchaser at the time of signing a land contract, and which described the land being sold, was an important element in establishing the defendants' good faith. Knowing this, on several previous occasions, the Prosecutor attempted to demonstrate with witnesses present in Court that a pur-

chaser was not given a public report to sign at the time the land contract was signed. On cross-examination many witnesses who had denied receiving a public report during their direct examination by the Prosecutor, admitted they must have received same when the document was found in their file dated the same day as the land contract.

Now, the Prosecutor having received a green light to proceed, takes a more effective and safe approach and reads excerpts from a letter of July 15, 1962, where a purchaser complained that he had been making payments and would soon be a titleholder, and then the complainant states: "In the meantime we have received the final subdivision public report" . . . [R. T. p. 9064]. Nissen stopped reading from the letter at that point leaving the jury to infer that the public report was not sent for a considerable period of time until after the purchase. The Prosecutor knew that the defense would have no way of cross-examining the witness; would have no way of establishing just when the public report was signed; would have no way of establishing whether the purchaser had received a copy of the public report at the time of executing the land purchase agreement; would have no way of testing the complainant's memory.

Knowing all of the above, and knowing the impression he must have just left with the jury, the Prosecutor then immediately picks out a letter of December 7, 1961, from another file where the purchaser complained that he did not get a subdivision report until after it was signed [R. T. 9064; Ex. 3-714]. Obviously the Prosecutor did not pull these two files out by mere coincidence; particularly since the only portion

he reads from Exhibit 3-714 is the statement that a public report was not received until after the contract was signed.

The Prosecutor continues this tactic and after reading from several files where the question of the public report is raised, concludes with the gratuitous comment to the jury after reading from Exhibit 3-1276 where an attorney writes to the Company that his clients never got a report: "As I examine the file, I might say, there is no public report in the file." [R. T. 9066-9069].

A reference to the transcript discloses that in effect, the Prosecutor is rebutting Byrnes' showing of good faith in the use of the public report not by calling witnesses but by reading from complaint letters. Byrnes is deprived of knowing any of the background concerning any of these complaint letters; deprived of cross-examination; deprived of explaining to the jury the reason that a public report may or may not have been sent in a particular instance.

For almost an entire morning session the Prosecutor continued with the above stated approach. After the morning recess the Prosecutor continued by reading selected excerpts from a rather lengthy complaint letter contained in Exhibit 3-1259. The Prosecutor read:

"You see, I am past my seventy-sixth birthday and I thought that for an investment I could realize a profit on it, but when I found nothing on the Ranch but sagebrush, one ranch house and one patch of alfalfa, I knew that I was born too soon to wait on the development of this project." [R. T. 9073].

One questions the Prosecutor's motive for this cumulative comment about sagebrush, a description that

the jury had been hearing from Government witnesses for approximately six weeks, unless it was his purpose to further inflame the jury by making reference to the fact that a salesman not on trial, sold this type of property as an investment to a seventy-six year old man.

After continuing with this approach through the reading of selected excerpts from several other files, the prosecutor finally concludes by reading excerpts from a letter contained in Exhibit 3-1564 as follows:

“Just a note. On my vacation I went up to the Ranch and was never so disappointed by anything in my life. I can't see why its so 'world-famous' unless its for being so desolate and hidden away. Montello, oh! Its worse than a peasant village in old Mexico. Why don't somebody clean Montello up. I never seen so much trash and junk. Make a decent looking western town will you? I'll tell you truly I feel I have been cheated . . . “. . . I'll tell you it discouraged me and made me sorry I bought for there was 'great misrepresentation'. Don't you ever have a rain up there?”

Nissen then concludes by commenting “there are two other pages to the letter.” [R. T. 9083-9084].

What was the purpose of Nissen reading that letter as his last? Certainly it was not to acquaint the jury with any new information. Certainly it was not to show that this information was transmitted to Byrnes, since this letter, like all of the other letters read, was in no way connected with Byrnes or any of these defendants except that it appeared in the Gamble Ranch file. What indeed, unless it was a part of a tactic to arouse the sympathies of the jury and prevent an ob-



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jective appraisal of the testimony of the Prosecution's concluding witness, the postal inspector who investigated the case and who was about to testify to conversations which he had with each of the defendants', conversations wherein they claimed that it was not their intention to misrepresent the property at any time, and where they stated they relied upon the information contained in the public report and upon experts.

Consequently, when one views the entire Government's case, it is clear that this case is held together by testimony calculated more for its ability to incite anger or prejudice against Byrnes than for its probative value.

### Conclusion.

For the reasons as set out in appellant Reisman's Opening and Reply Briefs, and the forgoing reasons, the judgment of conviction should be reversed.

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**Certificate.**

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

EARL P. WILLENS



No. 21782 and 21782-A

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SAMUEL REISMAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

Appeal From the United States District Court,  
Central District of California.

---

REPLY BRIEF OF APPELLANT.

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## REPLY BRIEF OF APPELLANT.

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### Preliminary Statement.

The government alleges that appellant's opening brief contains a statement of facts "consisting almost entirely of Reisman's testimony and that of witnesses favorable to him." (Govt's Br. 3.) The government also complains that appellant's statement of facts is only eight pages long and therefore submits a "brief statement of facts." (Govt's Br. p. 3.) This "brief" statement then begins; it ends 45 pages later. It is in no sense a statement of *facts*. It is an *argument* of the prosecution's case. Examples of some of the allegations characterized as "facts" are: "the so-called 'development program' of the company was merely a promo-

tional gimmick” (Govt’s Br. p. 29); “D. *DECLINE AND FALL*. The technique used by appellants in selling their land was to talk about and picture features in isolated spots to the north of what they said was a 53 mile long ranch . . . and to sell desert land at the south”. (Govt’s Br. p. 37.) This “statement of facts” bears a remarkable similarity, in its tone and selectivity, to the prosecutor’s final argument at the trial. It is grossly distorted and patently unfair.

Ninth Circuit Rule 18(c) provides that an appellate brief is to contain “A *concise* statement of the case, presenting the *questions involved*. . . .” (Emphasis added.) The government’s lengthy statement and appendices are designed to divert the attention of this Court from the important questions of law raised by appellant. Appellant does not argue the sufficiency of the evidence in this appeal. Nor does appellant admit that the evidence is sufficient to sustain a conviction. But appellant recognizes that this Court does not preside over a trial *de novo*. As in *Phillips v. United States*, 356 F. 2d 297 (9th Cir. 1965), the errors of law committed throughout this long trial require reversal quite apart from the question of sufficiency of the evidence. Appellant will therefore not oblige the government by re-arguing its factual case on appeal. The facts relating to each question of law raised by appellant are presented in detail under each separate heading. These are the facts with which we are here concerned.

## ARGUMENT.

### I.

#### THE IMPROPER ADMISSION IN EVIDENCE OF COMPLAINT LETTERS, AND THE COURT'S ERRONEOUS INSTRUCTIONS CONCERNING THE PURPOSE FOR THEIR ADMISSION, CONSTITUTE REVERSIBLE ERROR.

The government's brief misstates appellant's contentions regarding the failure of the trial court to comply with the requirements for the admission in evidence of complaint letters under *Phillips v. United States*, 356 F. 2d 297 (9th Cir. 1965). Appellant's three contentions are first set out in pages 11 and 12 of the opening brief and again in major headings A, B, and C of argument number I. The three points are:

- (1) The trial court did not make the necessary preliminary finding that appellant had actual, personal knowledge of the complaint letters;
- (2) The evidence is insufficient to show that appellant had actual, personal knowledge of the complaint letters;
- (3) The court erred because it did not admonish the jury that complaint letters could be considered against appellant only if independent evidence showed he had actual, personal knowledge of such letters.

The government ignores point (1) altogether. (Govt's Br. p. 49.) And the government's arguments regarding points (2) and (3) are without merit.

(1) The Court Did Not Make the Necessary Preliminary Determination That Appellant Had Actual, Personal Knowledge of Complaint Letters.

The *Phillips* case holds that where complaints are admitted on the theory that a defendant's actual knowledge of them shows that he must have realized the scheme was fraudulent,

“ . . . the trial court should also, at the time the documents are offered in evidence, make a preliminary determination as to whether there is prima facie evidence showing such actual knowledge. Lacking such prima facie showing, the documents should not be admitted. No such preliminary determination was made in this case.” (356 F. 2d at 306, n. 8.)

No such preliminary determination was made in the present case. Here the complaint letters were received in evidence because the court thought they were business records under 28 U.S.C. §1732. The court's position, repeated throughout the case, was:

“If there was testimony these were kept in the normal course of business I will allow them in.”  
[R. T. 5957-5958.]

No other foundation for admission of the letters was required. The letters were erroneously admitted as business records. (*Phillips v. United States, supra*, 356 U.S. at 307.) And because the court received the complaints as business records it did not make the necessary preliminary determination that appellant had actual, personal knowledge of the letters. The court was not concerned with personal knowledge. The court



asked only whether the letters were “kept in the normal course of business.” [R. T. 4443.] According to the court, “That would be the question.” [R. T. 7512.]

The government’s brief makes no mention of the court’s failure to make the preliminary determination. This Court may therefore assume that the government concedes the error.

**(2) The Evidence Is Insufficient to Show That Appellant Had Actual, Personal Knowledge of the Complaint Letters.**

The government’s argument apparently is that because appellant had *general knowledge* that refund requests and complaints were being made, he had *actual, personal knowledge* of each claim of fraud admitted against him. This attempt to avoid the holding of the *Phillips* case cannot succeed. In *Phillips* the complaint letters were sent to an escrow company. One of the defendants, an attorney, set up the procedure to be followed by the company in processing the letters. An employee of the escrow company “sent a daily report of sales and inquiries” to three of the defendants. One defendant actually asked that some letters be sent to him. But the important point is that neither he nor the other two defendants had seen the complaints that were admitted in evidence.

“There is no direct evidence that Phillips or Walker had *seen* any letters of this kind, or that any of the appellants had *seen* the coupons and requests comprising exhibit 984.” (356 F. 2d at 303. Emphasis added.)

Although the defendants in *Phillips* had general knowledge that complaints were being received by the

escrow company, this Court reversed the conviction because the defendants did not have personal knowledge of the *particular complaints admitted against them*. The Court noted:

“[T]he trial court stated that the evidence showed that ‘some’ of the defendants were in charge of the escrow office and that some of the letters were specifically addressed to ‘some’ of the defendants. There were seven defendants and the court did not indicate whether it included any of the three appellants among the ‘some’ defendants to which the court referred. Examination of the documents contained in these two exhibits demonstrates that none of the letters and requests were addressed to any of the appellants.” (356 F. 2d at 306, n. 11.)

Of course, none of the complaint letters were addressed to appellant in this case. And there is no evidence that appellant saw any letters but the thirteen he reviewed. The government says “Reisman also told Secretary Manzin to notify him of complaints which came in and she did so.” (Govt’s Br. p. 53.) The statement is a distortion of appellant’s testimony. The uncontradicted evidence shows that appellant reviewed only thirteen complaint letters. The government’s statement refers to appellant’s testimony that in September, 1961 he asked to be notified of complaints. [R. T. 13,184-13,185.] But the government omits the preceding sentence of the transcript in which appellant testified that the thirteen letters “right in front of me are the sum total” of the complaints he saw. [R. T. 13,184.] The government betrays the weakness of its position by its attempt to show that appellant had personal knowledge of complaints because he “kept in touch” with

Nevada attorney McDonald. (Govt's Br. p. 53.) McDonald actually received and responded to complaint letters. He was retained by the company for that purpose. There is no evidence that appellant saw or discussed with McDonald a single one of these letters. But the government's claim that appellant had personal knowledge of complaints reviewed by McDonald is a new one. The government's real position, the position it took at trial, is that *McDonald's personal knowledge was imputed to appellant*. The prosecutor told the court that the letters reviewed by McDonald "are offered by us, your Honor, to show number one, that the statement was made *to the company* and therefore *they had notice* a complaint was made. [R. T. 7517. Emphasis added. Exs. 3-2051, 3-2060, 3-2059-A, 3-2063, 3-2057, 3-2047, 3-2062, 3-2063, 3-2044, 3-2048, 3-2049, 3-2053, 3-2054, 3-2056. Admitted, R. T. 7528.] The court agreed with the government's constructive notice theory.

"The Court: Yes, but if he [McDonald] was acting at the instructions of the company, why, it seems to me he is then acting *as an agent*, unless you have some authority to the contrary . . . The *whole question is whether the attorney is the agent of the company* and when the company employs him to answer complaints, it seems to me *they are bound by the notice he receives*." [R. T. 7514-7515. Emphasis added.]

The government seeks to impute the knowledge of attorney Ross to appellant because several letters concerning complaints were signed by Ross "for Reisman". (Govt's Br. pp. 53-54.) The government found a total of four such letters. [Exs. 2-1226-B, 2-1266-C, 1-545,

1-578.] There is of course no evidence that appellant saw even these letters. Ross handled about 269 complaints and ten or twelve lawsuits brought by purchasers. [R. T. 11,248-11,251; Exs. ER; *e.g.* Exs. 3-415 to 3-550; some examples are collected in Appendix B to Appellant's Opening Brief.] The government makes no mention of the hundreds of complaints answered by Ross in his own name. [See, *e.g.*, Exs. 3-1 through 3-552 containing many complaints answered and handled by Ross.] The government claims that appellant had personal knowledge of complaints handled by Ross because the letters "were available to Riesman in Ross' office." (Govt's Br. p. 54.) This Court was not impressed by "availability" evidence in the *Phillips* case. There this Court held that the evidence was insufficient to show personal knowledge of letters although they were processed in an escrow company set up by one defendant; all defendants obviously had access to the company files; all cancellation letters were kept in the office files; the defendants received a daily report of sales and inquiries and a weekly report of cancellations; and forty or fifty complaint letters were actually sent to one defendant. In this case Ross was retained to handle complaints and was entirely independent of appellant. There is no conflict in this testimony. [R. T. 11,151, 11,165, 11,247-11,251.] And the government's brief is silent about the complaints reviewed by attorney Finell in early 1962. The government does not even speculate that appellant had access to Finell's files. Nonetheless, the government asks this Court to find, on the basis of no evidence, that appellant had actual, personal knowledge of all complaints admitted in evidence.

The government's argument is that appellant had actual, personal knowledge of every complaint letter admitted against him. It is of no consequence to the government that (1) the uncontradicted evidence shows that appellant saw only thirteen complaint letters; (2) there is absolutely no evidence that appellant saw any of the hundreds of other letters admitted against him; (3) at all times after January, 1962, complaint letters were being reviewed and processed by a specifically designated person other than appellant; (4) there is a total lack of evidence that anyone assigned to review complaints either showed them to appellant or consulted him concerning the letters; (5) none of the letters were addressed to appellant; and (6) there is no support in the evidence for the government's charge that appellant rifled the files of other lawyers.

All the evidence shows that appellant did not have personal knowledge of any letters but the thirteen he reviewed. The admission of the hundreds of other letters against appellant was prejudicial error and requires reversal.

### **(3) The Court's Erroneous Instructions Regarding Complaint Letters Require Reversal.**

Appellant in his opening brief quotes many of the admonitions given by the court concerning the purpose for which complaint letters were admitted. All of these instructions violated the principles established by this Court in the *Phillips* case. But there is not one word about them in the government's brief. The instructions were so manifestly erroneous that the government does not even suggest that these instructions, given on the vital issue of appellant's intent, were correct. Instead, the government now argues for the first



time that the complaints “were admissible for several other purposes.” (Govt’s Br. p. 55.) In other words, the government argues that the complaints were “*admissible*” for purposes other than those for which they were in fact *admitted*.

The question at this stage of the proceedings is not how many theories the government can devise to justify the erroneous admission of evidence. It does appellant no good to hear the government say now that it has a *new theory* after the jury has considered the evidence on the *wrong theory*.

The government belatedly contends that complaint letters were “admissible as the documents in response to which lulling letters were sent (Govt’s Br. 55), and “to rebut the defense contention that virtually all complaints were made after January, 1962 and were prompted by adverse publicity.” (Govt’s Br. p. 56.) The government of course knows that the so-called “lulling letters” were not sent in response to all customer complaints. In fact, they were not sent to the customers who sent letters containing the most prejudicial allegations of fraud. In January, 1962 attorney Finell established the policy of refunding money to purchasers who claimed the land had been misrepresented. [R. T. 12,599-12,603.] The letters characterized by the government as “lulling letters,” correctly telling customers that the company intended to develop the land, were not sent to purchasers who claimed misrepresentation. They were sent only to purchasers who wanted to rescind their contracts because they had changed their



minds and no longer wanted the land, or because they had financial or other problems. And the government is not sincere in contending that the complaint letters were "admissible" to rebut the defense contention that complaints were prompted by adverse publicity in January, 1962. In the first place, the defense contention was correct. A quick review of some of the letters in Appendix A to appellant's opening brief removes all doubt that these letters were sent in response to news articles and television announcements incorrectly stating that the company would give refunds to all purchasers. The authors of these letters say they are writing because of the publicity. And of course if the government merely wanted to show when the letters were sent it could have done so without introducing the highly inflammatory contents of the letters.

The truth is that the government offered complaint letters for one purpose only: to prove that someone in the company knew of the complaints and that therefore the defendants had criminal intent. They were offered for the same purpose that the letters in the *Philips* case were offered. The prosecutor made his position plain throughout the trial. On one occasion he said, in the presence of the jury:

"Mr. Nissen. May I state for the record, your Honor, that anything that is a statement of someone else, reported to Gamble Ranch or to any of their personnel, *is offered for this reason:*

"To show that the information *was so reported and that Gamble had that information in their file.*"

[R. T. 4834 Emphasis added.]

At another time, the prosecutor told the court:

“Mr. Nissen: They [complaints] are offered by us, your Honor, to show number one, that the statement was made *to the company* and therefore *they had notice* a complaint was made.

The Court: That is right.

Mr. Nissen: That is the reason.” [R. T. 7517. Emphasis added.]

All complaint evidence was offered by the government on the issue of the defendants’ intent and for no other purpose.

“Mr. Nissen: . . . You see, what we are calling these witnesses for is *intent*. If, say, five or six witnesses in a row understood the Dukane film strip to say something and they went up there and saw it was not as the film strip said, and perhaps *complained to the company*, as we think these witnesses will show, complained to Mr. Benearon’s, Byrnes’ and Reisman’s *representatives*—in fact, *some* of the complaints even being referred *perhaps* to them then *you have notice* these things aren’t right.” [R. T. 2300-2301. Emphasis added.]

It is too late for the government to claim that complaint letters were “admissible” on newly created theories. They were offered to show intent. The government hoped to prove intent constructively. In the statement quoted above the prosecutor admitted that all complaints were not seen by appellant. He said “*some* of the complaints” were “*perhaps*” referred to appellant. But even more important than the prosecutor’s theory in offering the complaint letters are the court’s

admonitions to the jury as to how the complaints were to be considered. The jury considered the letters on the question of appellant's intent because the court repeatedly told them to do so. At no time did the court tell the jury that complaints could be considered for any of the reasons now urged by the government. A typical instruction was as follows:

"The complaints are relevant on the issue of the defendants' *intent* and *good faith*.

"If the defendants knew that people were being misled by solicitation literature and salesmen's representations and continued the same operation with this knowledge, this is a matter that the jury may consider in determining whether the defendants or any of them had any *intent to defraud*."

[R. T. 6031-6032. Emphasis added.]

The court gave many similar instructions as complaint letters were received in evidence.

". . . you can consider it [a complaint] in considering the information the company had relative to complaints and *intent*." [R. T. 8943. Emphasis added.]

". . . you can consider it [a complaint] in relation to the *question of intent* on the part of the defendants." [R. T. 8867-8868. Emphasis added.]

"Now these [complaint letters] are offered, as I have already told you, I think on more than one occasion, not for the truth of the facts set forth in the complaints but to show as evidence of the fact that these complaints were called to the attention of the defendants, and *the jury is to consider them as to the intent of the defendants* to defraud or misrepresent." [R. T. 6337-6338. Emphasis added.]

In his opening brief, appellant has pointed out in detail that the court's instructions concerning complaint letters violated the rule of the *Phillips* case. Appellant will not repeat those arguments here because the government has ignored them in its brief. It is enough to recognize that the government cannot change its theory of admissibility after the jury has considered the evidence on the wrong theory. The letters were admitted to be considered on the question of the defendants' intent. The court instructed the jury to consider the letters on the question of intent. The jury did so. Theories can be changed by the government; but appellant's conviction based upon prejudicial error can be changed only by this Court.

#### (4) Appellant Repeatedly Objected to Complaint Letters Offered in Evidence.

In a final effort to avoid the application of the *Phillips* case, the government asserts that appellant did not object to the offer of complaint letters. This grueling thirteen week trial was fraught with objections to evidence ranging from the incompetent and prejudicial complaint letters to persistent acts of misconduct by the prosecutor. In such a trial defense counsel always experience the frustration of having to decide whether to object and take the chance of antagonizing the jury, or not to object and risk waiving the defect on appeal.

But appellant did object to the admission of complaint letters. Complaints are material against a defendant only if there is a *prima facie* showing "that such defendant had actual knowledge of the documents while the asserted scheme was in progress . . . Lacking such

*prima facie* showing, the documents should not be admitted.” (*Phillips v. United States, supra*, 356 F. 2d at 306 and n. 8.) This Court reversed the convictions in *Phillips* because “[n]o such preliminary determination was made. . . .” (356 F. 2d at 306, n. 8.) Complaint letters may be considered on the question of criminal intent only if the evidence shows that a particular defendant had actual knowledge of the letters. But they are not even admissible until the government has made a *prima facie* showing of actual knowledge. Until then they are immaterial. Accordingly, counsel objected to complaint letters because “they are not material to the issues here” and because the statements in the letters constituted hearsay. [R. T. 4834.] The government made no attempt to show that appellant had actual knowledge of the letters. The court overruled appellant’s objections when the prosecutor said the letters were “[t]o show that the information was so reported and that *Gamble had that information in their file.*” [R. T. 4834.] Counsel pointed out that the initial determination whether purchaser evidence should be submitted to the jury on the issue of intent was a question of law. [R. T. 2281-2282.] All such objections were overruled.

At no time did the prosecutor explain how complaints were material. His only justification for their admission was simply *that they were complaints.*

“The Court: What is the materiality?”

Mr. Nissen: These are complaints and refunds [sic] files, sir, with letters from customers to and from, about their visits to the Ranch and so forth.

The Court: Ordered in evidence.” [R. T. 5958.]

When counsel objected to complaints because they were not material to the issues involved, the court said:

“If there was testimony these were kept in the normal course of business I will allow them in.”  
[R. T. 5958.]

It became obvious early in the trial that the court considered relevant and material all letters sent to the company and found in company files.

“The Court: . . . If it is a letter in the file of Gamble Ranch and the file has been—the foundation has been laid, that the file is kept in the normal course of business, *I think it can be considered.*” [R. T. 4443. Emphasis added.]

The court had only to be satisfied that complaints were “kept in the normal course of business.”

“The Court: These are records of the Gamble Ranch?

The Witness: Yes.

The Court: Kept in the normal course of their business?

The Witness: Yes.

The Court: All right.” [R. T. 6337. See also R. T. 8862-8865.]

Thus the court confused the business records exception to the hearsay rule with the question of materiality. The documents were not admissible as business records. (*Phillips v. United States*, *supra*, 356 F. 2d at 307.) And they were certainly not material merely because they were found in company files. The government made no showing of materiality. Defense objections were overruled without exception. In the face of the



court's rigid position the futility of continuing to object is obvious. The court recognized the ambivalent position in which defense counsel found themselves and accordingly permitted a continuing objection to all complaint and purchaser evidence.

"Mr. Rothman: Before counsel starts, we had, as I understand, a continuing objection.

The Court: Yes, as to these complaint files you have your continuing objection." [R. T. 6333. See also R. T. 2311-2313.]

The government's argument throughout this trial was that every paper found in company files or even remotely concerning the Gamble Ranch was admissible. The government made no attempt to demonstrate the materiality of the thousands of documents received in evidence. The defense protested that the prosecutor was making "a blanket effort to lay a foundation by one general question as to every document". [R. T. 7513.] The protests were unavailing. The efforts were successful. The government made no showing that appellant had personal knowledge of complaint letters. It was not necessary to do so. The documents were admitted in evidence because they were in the possession of the company. The government's theory of evidence is unique: the government may offer any kind of evidence, no matter how prejudicial and incompetent it may be; no showing of materiality is necessary; the mere offer shifts the burden to the defendants to explain why the evidence is *not material*. Thus the government is relieved of all responsibility for the unfair presentation of evidence. It is always open to the government to complain on appeal that "the defense never once claimed a lack of personal knowledge of com-

plaints.” (Govt’s Br. p. 52.) But the defense did argue that the defendants had no personal knowledge of complaints. The court’s answer was that the defendants’ knowledge could be proved constructively, that the defendants were bound by the knowledge of anyone in the company.

“Mr. Rothman: . . . Unless there is some evidence, it seems to me, that *that knowledge was conveyed to these defendants*—these defendants are not the defendants that hired him [attorney McDonald].

*These defendants are individual defendants, they are not the corporation.*

“The Court: Then the whole question is whether the attorney is an agent of the Company and when the Company employes [sic] him to answer complaints, it seems to me *they are bound by the notice he receives of the complaint.*” [R. T. 7515. Emphasis added.]

This Court expressly rejected such a constructive notice theory in the *Phillips* case. There the defendants arranged to have complaints processed by an escrow company of which Mrs. Bardwell was in charge. She handled complaints and reported weekly to the defendants. But her knowledge was not the knowledge of the defendants. They were not bound by the notice she received. The trial court’s instructions were erroneous because:

“Under the instruction given, the jury could have attributed knowledge to one or more of the appellants concerning the documents, because another appellant, or an acquitted defendant, *or the*

*land company, escrow company, or the Bardwells* (who were not defendants) had actual knowledge of such documents.” (356 F. 2d at 305. Emphasis added.)

Counsel for appellant did not mechanically repeat objections after the court had clearly indicated it would overrule them. The court had ruled. The rulings were erroneous. But these were errors that “would have been magnified in its influence on the jury by an objection and motion for mistrial.” (*Dunn v. United States*, 307 F. 2d 883, 886 (5th Cir. 1962), citing *Ginsberg v. United States*, 257 F. 2d 950 (5th Cir. 1958).) Letters charging appellant with fraud and misrepresentation were seriously prejudicial to appellant’s defense that he had at all times acted in good faith and had no intent to defraud. The courts recognize that in many cases “the failure to object to a grave violation manifestly stems from the attorney’s fear that an objection would only focus attention on an aspect of the case unfairly prejudicial to his client.” (*United States v. Sawyer*, 347 F. 2d 372, 374 (4th Cir. 1965).) At the end of the government’s case in chief appellant moved to strike “all evidence pertaining to . . . letters of complaint, and files of Gamble Ranch relative to customer complaints, including but not limited to Exhibits 3-296 to 3-414, 3-415 to 3-550, 3-553 to 3-577, 3-2047, 3-2051, 3-2057, 3-2059a, 3-2060, 3-2062 and 3-2063.” [C. T. 932.] The motion was denied.

The objections and motions to strike made by the defense throughout this case were sufficient to preserve appellant’s right to question in this appeal the prejudicial errors committed by the trial court.

(5) **The Erroneous Admission of Complaint Letters and the Court's Instructions Concerning the Purpose for Their Admission Constituted Plain Error.**

Appellant did not frame his objections to complaint evidence in the precise terms of the *Phillips* case because that case was not decided until after appellant's trial. *Phillips* stated new principles. No case had so clearly defined the law concerning the admissibility of customer complaint letters. Appellant should not be penalized because counsel did not anticipate this supervening decision. And despite the government's argument, this Court has the inherent power to notice prejudicial error on appeal even in the complete absence of objections. This Court is not required to affirm a conviction rendered after an unfair trial. Criminal Rule 52b states the plain error rule:

“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” (Fed. R. Crim. P. 52b)

Plain error is prejudicial error. (*Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. ed. 1557, 1567 (1945); *Osborne v. United States*, 351 F. 2d 111 117 (8th Cir. 1965).) The erroneous admission in evidence of complaint letters in this case and the instructions concerning their admission constituted prejudicial error. This Court held in the *Phillips* case that such error was prejudicial. The Court there reversed the convictions even though there was “ample evidence to find appellants guilty beyond a reasonable doubt.” (356 F. 2d at 306.) The prejudice is far greater in this case where not ten but hundreds of com-

plaint letters were erroneously received against appellant.

Error is likely to be prejudicial when the issue of innocence or guilt is a close question. This was a close case. Appellant's principal defense was his good faith. At the close of the prosecution's case, the court said that "the jury is going to have a very difficult time" deciding the question of good faith. [R. T. 9334-9335.] In *Osborne v. United States*, 351 F. 2d 111, 118 (8th Cir. 1965), the Court said:

"The fact that the jury deliberated some sixteen hours, covering two full working days, that they requested an additional exhibit and the re-reading of instructions, lends credence to the view that the case was a close and difficult one."

In the present case the jury deliberated from June 29 to July 2, 1965. The record indicates that they deliberated for about thirty hours. The jury asked for an exhibit and made several other requests of the court during that time. On June 30, they asked the court to re-read the "*instructions on misrepresentation and intent.*" [C. T. 995-1004. Emphasis added.]

Where the evidence on both sides of a case presents a conflict that can only be resolved by a jury, it is necessary "that no prejudicial evidence be admitted in violation of any rule of law." (*United States v. Rohalla*, 369 F. 2d 220, 222 (7th Cir. 1966); see also *Gibson v. United States*, 363 F. 2d 146, 148 (5th Cir. 1966); *United States v. Readus*, 367 F. 2d 689, 692 (6th Cir. 1966).) In *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. ed. 1557 (1945), defendants were convicted of a single general conspiracy although the proof made out a case of several conspiracies. The



Court of Appeals held that the trial court's finding of only one conspiracy was erroneous but not prejudicial "since guilt was so manifest." (151 F. 2d at 172.) The Supreme Court reversed. The error was plain error. The test of plain error is not whether a conviction is supported by sufficient evidence apart from the error. The conviction must be reversed if there is a doubt whether the error substantially influenced the result.

"... if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the jury was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry *cannot be merely whether there was enough to support the result*, apart from the phase affected by the error. *It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt*, the conviction cannot stand." (328 U.S. at 765, 90 L. ed. at 1566-1567. Emphasis added. Accord, *Oliver v. United States*, 335 F. 2d 724, 728 (D.C. Cir. 1964), cert. den. 379 U.S. 980, 65 S. Ct. 686, 13 L. ed. 2d 571; *Blackwell v. United States*, 244 F. 2d 423, 431 (8th Cir. 1957).)

This Court will consider an appeal the propriety of an instruction, even though no objection was made at the trial, where there is a "possibility that 'plain error' may be involved. . . ." (*Perkins v. United States*, 315 F. 2d 120, 124 (9th Cir. 1963).) The well established rule followed by the Ninth Circuit was announced in *Morris v. United States*, 156 F. 2d 525 (9th Cir. 1946):

"Where life or liberty is involved, an appellate court may notice a serious error which is plainly



prejudicial even though it was not called to the attention of the trial court in any form.' In a criminal case, it is always a duty of the court to instruct on all essential questions of law, whether requested or not." (156 F. 2d at 527. Accord, *Remmer v. United States*, 205 F. 2d 277, 290, n. 16 (9th Cir. 1953); *Hatchett v. Government of Guam*, 212 F. 2d 767, 769 (9th Cir. 1954); *Block v. United States*, 221 F. 2d 786, 788 (9th Cir. 1955); *Samuel v. United States*, 169 F. 2d 787, 789 (9th Cir. 1948).)

The improperly received evidence and erroneous instructions in this case involved the critical issue of intent and good faith. Appellate courts are particularly inclined to find plain error in such a case. In *Danielson v. United States*, 321 F. 2d 441, 445 (9th Cir. 1963), the defendant was convicted of conspiring to forge United States Treasury Bonds. The trial court instructed the jury that the intent to defraud was an essential element of the offense but failed to add that the defendant's purpose must have been to obtain or to enable others to obtain a sum of money from the United States. Defendant's counsel did not object to the incomplete instruction as required by Criminal Rule 30. But because the instruction related to the vital issue of criminal intent the Court held the omission in the instruction was plain error.

As pointed out above and in appellant's opening brief, the trial court incorrectly held that complaint letters were admissible because the court supposed that the knowledge of one person in the venture could be imputed to appellant. The court's instructions permitted the jury to find appellant guilty on the basis of con-

structive knowledge. Such an instruction is plain error. In *Jefferson v. United States*, 340 F. 2d 193, 197 (9th Cir. 1965), the defendant was convicted of conspiring to deal with drugs knowing they had been illegally imported. The trial court instructed the jury that knowledge of one member of the conspiracy that the drugs had been illegally imported could be imputed to other defendants. Because the crime "requires proof of specific knowledge by the defendant that the drug was illegally imported," the court on appeal held that "the giving of such instruction constituted plain error, prejudicial to the rights of the appellant." (340 F. 2d at 197.)

In *Haner v. United States*, 315 F. 2d 792, 796 (5th Cir. 1963), the defendant was convicted of wilful failure to file income tax returns. The trial court erroneously instructed the jury that the word "wilful" meant a "careless disregard whether one has the right to so act." On appeal the Court held that the instruction constituted plain error and required reversal despite defendant's failure to object to it.

Many of the court's instructions in the present case told the jury that complaint letters *did come to the attention of the defendants*. The court took from the jury the question *whether they did* come to the defendants' attention. For example, when the court received in evidence exhibits 3-415 to 3-550 it told the jury:

"The Government offers them as evidence of *the fact that these complaints came to the attention of the defendants.*" [R. T. 6333. Emphasis added.]

\* \* \* \* \*

"Now these are offered, as I have already told you, I think no more than one occasion, not for

the truth of the facts set forth in the complaints but to show as evidence of *the fact that these came to the attention of the defendants. . . .*" [R. T. 6337-6338. Emphasis added.]

There are numerous other examples of instructions that took from the jury the question whether the defendants actually did have personal knowledge of the complaints. [See, *e.g.*, R. T. 6335, 5957-5959, 8867-8868.] These instructions constituted plain error. In *Clifton v. United States*, 341 F. 2d 649, 650-651 (5th Cir. 1965), the defendant was convicted of transporting a stolen vehicle in interstate commerce. The defendant denied having knowledge that the vehicle had been stolen. The court instructed the jury that there was "no dispute . . . as to the car being stolen." The defendant's counsel did not object to the instruction. The court on appeal held that because the instruction improperly assumed as true a fact in dispute it constituted plain error. (See also, *Barnes v. United States*, 341 F. 2d 189, 192 (5th Cir. 1965) [trial court's instructions improperly assuming that defendant had possession of car held plain error]; *Cross v. United States*, 347 F. 2d 327, 329-330 (8th Cir. 1965) [incorrect instruction on entrapment held plain error though defendant first objected and then withdrew objection]; *United States v. Harris*, 331 F. 2d 185, 188 (4th Cir. 1964) [instruction improperly permitting jury to consider evidence of defendant's reputation held plain error]; *Mims v. United States*, 375 F. 2d 135, 147-148 (5th Cir. 1967) [court's instruction that an attempt to rob a bank had been made because the defendant's actions had gone beyond the preparation stage held plain error].)

The issue of paramount importance in this case is whether the conviction is to stand even though it is based on prejudicial error. Even the government does not deny that the complaint letters were prejudicial to appellant. But the government asks this Court to hold that defense counsel waived appellant's right to a fair trial. The courts hold otherwise. In *Tatum v. United States*, 190 F. 2d 612 (D.C. Cir. 1951), the defendant was convicted of statutory rape. The jury had two functions, one to determine guilt or innocence, the other to pass upon the death sentence. Defendant's counsel in final argument admitted that his client was guilty. The admission was explained as a tactical maneuver to impress the jury with the candor of the defense in an attempt to persuade the jury to mitigate punishment. The court on appeal decided that the lawyer's admission "went too far" because the "client had not conceded guilt." (190 F. 2d at 618.) The defendant was deprived of a jury determination of his guilt or innocence because of his own lawyer's conduct. But in a criminal case, the court will "check carefully the record for error prejudicial to defendant *which he did not urge*." (190 F. 2d at 614. Emphasis added. Accord, see *Williams v. United States*, 131 F. 2d 21, 22 (D.D.C. 1942); *Fisher v. United States*, 328 U.S. 463, 467-468, 66 S. Ct. 1318, 90 L. ed. 1382, 1386 (1945); *Screws v. United States*, 325 U.S. 91, 107, 65 S. Ct. 1031, 89 L. ed. 1495, 1505-6 (1945); *Morris v. United States*, 156 F. 2d 525, 527 (9th Cir. 1946); *Corson v. United States*, 147 F. 2d 437, 439 (9th Cir. 1945).) Technical mistakes will not be permitted to stand in the way of a fair trial. The Court in the *Tatum* case held that despite defense counsel's admission, the trial court should have

instructed the jury that they were to determine whether defendant was guilty.

“Apparently relying upon defense counsel’s view of the matter, the court did not specifically caution the jury that, notwithstanding the unauthorized concession, the defendant was entitled to have that body alone determine his guilt or innocence . . . This was a defect ‘affecting substantial rights.’ ” (190 F. 2d at 618.)

In *United States v. Cumberland*, 200 F. 2d 609, 611 (3d Cir. 1952), the defendant was convicted for selling marijuana. The court gave erroneous instructions that assumed as true facts in dispute, and incorrectly stated the law regarding character evidence and the burden of proof. The Court reversed the conviction although no objections were made and even though the conviction was supported by the evidence. A lawyer cannot forfeit his client’s right to a fair trial by failing to object to prejudicially incorrect instructions.

“[W]here, particularly in a criminal case, several errors appear which in the aggregate contain a potential of substantial damage to the accused, *the policy of sound and time saving trial administration which would penalize failure to point out error below, may have to yield to more important considerations of making sure that the accused has been treated fairly.* We think this is such a case. The likelihood of injustice seems sufficient to require a new trial.” (200 F. 2d at 611, Emphasis added.)

This was a close case. It is highly probable that the verdict was substantially influenced by the erroneous



admission of the complaint letters and by the court's incorrect instructions as to how the complaints were to be considered. The errors are prejudicial under the holding in the *Phillips* case. This Court has the power to cure the prejudice and resulting unfairness to appellant by reversing the conviction.

### Conclusion.

(1) The trial court did not make the necessary preliminary determination that appellant had actual, personal knowledge of the hundreds of complaint letters admitted and considered against him. The court erroneously received the letters as business records. The government does not even contend that the court made the preliminary determination.

(2) The evidence is insufficient to show that appellant had actual, personal knowledge of the complaint letters. This Court decided in the *Phillips* case that general knowledge that complaints and refund requests were being made is not actual, personal knowledge. Appellant saw only thirteen complaint letters. This evidence is uncontradicted. At all times after January, 1962 independent counsel were retained to process complaints. There is no evidence that appellant saw any of these complaints. At trial the prosecutor argued that "some of the complaints" were "*perhaps*" referred to the defendants. [R. T. 2300-2301.] Emphasis added.] Now the prosecutor speculates that appellant had personal knowledge because he "kept in touch" with a Nevada attorney who handled complaints (Govt's Br. p. 53) or because letters "were available" to appellant. (Govt's Br. p. 54.) Such guesswork was rejected in the *Phillips* case. It should be rejected here.



(3) The trial court instructed the jury that complaint letters were to be considered on the question of intent. The court did not cite any other purposes for which complaints could be considered. The prosecutor offered the letters only on the question of intent. But now, because this Court in the *Phillips* case held that instructions like those given in this case constituted reversible error, the prosecutor proposes new theories of “admissibility.” These theories are urged here for the first time. What might have been done is small comfort to appellant who was convicted because of what was in fact done. The government’s untimely argument is pure sophistry and should be rejected.

(4) Appellant repeatedly objected to the introduction of complaint evidence. All objections were overruled. When the court made its position plain, appellant stopped objecting. Continued objections would not have changed the court’s rulings. They would have magnified the prejudice to appellant.

(5) If the *Phillips* case had been decided when this case was tried, appellant’s objections would have been more precise. Appellant should not be penalized because counsel did not couch his objections in language as specific as that used by this Court in applying the principles so clearly enunciated in *Phillips*. The errors concerning complaint evidence constitute plain and prejudicial error under Rule 52(b). This Court has the power to redress the errors committed by the trial court by reversing the conviction.

## II.

### SUPPRESSION OF EVIDENCE.

#### A. Answers to Government Questionnaires.

In the Appellant's Opening Brief it is argued that there was a suppression of evidence in the refusal of the government to disclose to the defense answers to questionnaires which the government had sent out to all of the Gamble Ranch purchasers and prospective purchasers. In reply to this argument, the government does not deny that they had and have such documents; it is not denied that disclosure was demanded and refused; and the government does not contend that the undisclosed answers to questionnaires would not have been helpful. Instead the following arguments are made: (1) that the Jencks Act (18 USCA 3500) justifies nondisclosure (Govt's Br. pp. 58-59); (2) that the names and addresses of the Gamble Ranch purchasers and prospective purchasers were available to the defendants (Govt's Br. p. 59); and (3) that the government's proof showed that there were misrepresentations made even to some "satisfied buyers", and the fact that there were other "satisfied buyers" would not "exculpate" the defendants. (Govt's Br. p. 60.)

#### (1) The Jencks Act.

In our opening brief we have already argued that the Jencks Act is not applicable by its terms because: (1) it applies only to government witnesses or prospective government witnesses, and the persons who answered government questionnaires and were not called by the government are neither; and (2) it cannot be constitutionally applied to a suppression of evidence case. (App. Op. Br. pp. 76-78.) We will not repeat that argument

here. There are two additional reasons, however, for not applying the Jencks Act to this type of situation.

First: If the Jencks Act were construed as applying to witness statements in the possession of the government, although the government never calls the witness, then it cannot be reconciled with the holdings of the cases. Herein we will consider only cases decided since enactment of the Jencks Act in 1957.

In *Barbee v. Warden* (4th Cir. 1964), 331 F. 2d 842, failure to disclose fingerprint and ballistics reports was held to constitute a denial of due process. This is essentially the same as a witness statement. Such reports are customarily proved by the testimony of the expert who prepared the report, not by the report itself. In *Ashley v. Texas* (5th Cir. 1963), 319 F. 2d 80, the prosecutor failed to disclose a psychiatric report. In *Ellis v. U.S.* (D.C. Cir. 1965), 345 F. 2d 961, the case was remanded for the purpose of inquiring into the reason for discharging the victim from a hospital the same night he was admitted. This was also in the nature of a witness statement. The inquiry would begin by an examination of the hospital records, but if any evidence was thereby disclosed it would be presented by testimony of the attending physician. In *Giles v. Maryland* (1967), 386 U.S. 66 [17 L. Ed. 2d 737, 87 S. Ct. 793], there were separate opinions. One opinion by Justice White states that the defense should have been told that the prosecutrix had undergone a psychiatric examination, in which event the defense might have called the doctor who made the examination. *Brady v. Maryland* (1963), 373 U.S. 83 [10 L. ed. 2d 215, 83 S. Ct. 1194], is more directly in point than any other post-Jencks

Act case. The thing suppressed there was an extrajudicial confession of the co-defendant Boblitt who was not a prosecution witness.

There can be no question but that the Jencks Act, if given the broad interpretation contended by the government, cannot be reconciled with these cases. It might be argued that these cases do not create any inconsistency because they all arose out of state court convictions, and the Jencks Act applies only in the federal courts. This is true of all but one case. *Ellis v. U.S.* (D.C. Cir. 1965), 345 F. 2d 961, was an appeal from the United States District Court for the District of Columbia. This is not a valid distinction. The suppression of evidence cases are founded on due process. The United States Constitution guarantees due process in all courts, state and federal. It would be a strange rule indeed if it were held that the identical thing which constitutes a denial of due process in a state court does not have the same effect in a federal court because Congress has enacted a statute permitting federal prosecutors to do that which state prosecutors cannot.

Second: The Jencks Act can be reconciled with the due process cases by construing it so as to avoid the constitutional problem. In our opening brief we have argued that the Jencks Act is not applicable by its terms because it applies only to government witnesses and prospective government witnesses, and all of the answers to questionnaires involved here were given by people who were never called as government witnesses. It is arguable, however, that up to and during the time that the government is presenting its case in chief, every witness is in a sense a "prospective witness". But

when the government rests its case, that is no longer true. At that point any witness the government has not called is no longer a “prospective government witness”. In other words, the Jencks Act can be reconciled with *Brady v. Maryland*, *supra*, by holding that the Jencks Act ceases to apply when the government rests its case, and the prosecutor’s duty to disclose the evidence he has not used then begins.

This construction is consistent with the purpose of the Jencks Act which was passed to restrict the holding of the *Jencks* case. (*Jencks v. U.S.* (1957), 353 U.S. 657 [1 L. ed. 2d 1103, 77 S. Ct. 1007].) One reason for the restrictive legislation has been stated to be that the *Jencks* case “posed a serious problem of national security” (*Palermo v. U.S.* (1959), 360 U.S. 343, 346 [3 L. ed. 2d 1287, 79 S. Ct. 1217].) That reason is applicable to relatively few criminal cases, and it clearly has no relevance to this case. The real, though perhaps unwritten, reason for the Jencks Act is the same argument made in opposition to all proposals to expand criminal pretrial discovery. The government is concerned that defense counsel will tamper with government witnesses. That reason also ceases to exist when the government rests its case and thus decides not to call the witness. At that point at least there is no justification for depriving the defendant of the opportunity to use the evidence when he presents his case. The Jencks Act was never intended, and cannot be constitutionally construed, to authorize the government to suppress evidence.



(2) **The Availability to the Defense of the Lists of Names and Addresses of Purchasers and Prospective Purchasers.**

The government also claims that the answers to questionnaires cannot be deemed suppressed because the names and addresses of all purchasers were available to the defense. There are several answers to this argument.

In the first place, it is not knowledge of the fact that a given person is or may be a potential witness that is the controlling thing. The important thing is the knowledge of what the witness would say. If the prosecutor has such information and the defense does not, the prosecutor has a duty to disclose it. It is not a sufficient answer to say that the defendant knew the witness existed and could therefore have interviewed him and have found out for himself what the witness would say. *United States ex rel. Thompson v. Dye* (3rd Cir. 1955), 221 F. 2d 763, 767-768, is cited by the government for this point, but it is authority for our position. (Govt's Br. p. 59.) Therein the court recognized the general rule that "Evidence is not suppressed or withheld if the accused has knowledge of the facts and circumstances or if they otherwise become available to him during the trial". But the court held that the rule was not applicable when the defendant knew only that the witness existed and had not been apprised of what he would say. One of the arresting officers was not called by the prosecution, but his identity was known to the defense, and he was even present in the courtroom. The prosecutor knew and the defendant did not know that the officer's testimony would have favored the defense. The prosecutor's failure to disclose this information was held to be a denial of due process.



In fact, many of the suppression of evidence cases involve situations where everyone knows the witness exists, but where the prosecutor has special knowledge of what the witness would testify to if asked. In *Giles v. Maryland* (1967), 386 U.S. 66 [17 L. ed. 2d 737, 87 S. Ct. 793], much of the information in question could have been obtained by talking to the police officers, the prosecutrix, or other prosecution witnesses. In *United States ex rel. Butler v. Maroney* (3rd Cir. 1963), 319 F. 2d 622, the evidence in question was a prior inconsistent statement of a prosecution witness. Surely the witness knew he had made such a statement, and could have told the defense if asked. In *Ellis v. U.S.* (D.C. Cir. 1965), 345 F. 2d 961, the case was remanded to inquire into hospital records. It was the defendant's own testimony that one of the arresting officers had told him about the victim's going to the hospital, that raised the question. Clearly the records were as available to the defense as they were to the prosecution.

In the second place, the witnesses were not in fact as available to the defense as they were to the prosecution. The government's investigation had the effect of making these people unavailable to the defendant. The government questionnaires were sent out over a year prior to the trial with a covering letter from the United States Attorney. The letter informed the people that an official investigation was in progress, and they were told that "*Since this is an investigation, it is requested that you treat this communication as confidential.*" [Deft. Ex. BV; App. Op. Br. Appendix E.] Many people would take this to mean that they should communicate on this matter only with the United States Attorney's office. Far less

has been held to constitute a suppression of evidence. In *Alcorta v. Texas* (1957), 355 U.S. 28 [2 L. ed. 2d 9, 78 S. Ct. 103], the prosecutor told a witness not to “volunteer” certain information. He did not even tell him to go so far as to keep it in confidence. This was held to constitute a denial of due process.

**(3) Proof of Misrepresentations to “Satisfied Buyers”; and Satisfied Buyers Would Not “Exculpate” the Defendants.**

If the government contends that all satisfied buyers thought the land had been misrepresented to them, it is mistaken. As one example, Mrs. Garrick testified and so stated in answer to the government questionnaire which she and her husband filled out, that she had seen the land she purchased, and she felt that it had been “accurately represented”. [Govt’s Ex. 1-1125; App. Op. Br. Appendix E.]

The fact that other defense witnesses by way of satisfied purchasers would not “exculpate” the defendants because there is no requirement that every purchaser or any purchaser be deceived is entirely beside the point. The defendants are not here contending that the evidence is insufficient to support the verdict. The question is whether the defendants were deprived of the opportunity to use evidence which might have helped them. If the government is contending that the testimony of purchaser witnesses has little probative value, we are included to agree. But it was the government, not the defendants, that introduced this issue. The defendants would much prefer to try, for example, the water issue on scientific evidence instead of on the lay opinions of purchasers as to the availability of water. The legal

probative value of the opinions of the purchasers is doubtful in the extreme, but at the same time this type of testimony was very damaging to the defendants in the eyes and ears of the jury. Once the government put in this type of evidence, it became an important issue. Every satisfied purchaser the defense could find was an important witness. The defendants were deprived of the opportunity to fully meet this issue by the withholding of the answers to government questionnaires.

### **B. Division of Real Estate Files.**

As we read the government's argument on the Division of Real Estate files, it makes these points: (1) these files were not producible under the Jencks Act or the subpoena; and (2) the files could not be used to impeach Division of Real Estate witnesses on collateral matters. (Govt's Br. pp. 60-64.)

#### **(1) Jencks Act and Subpoena.**

The Jencks Act has no application whatever to the Division of Real Estate files. All of the arguments heretofore made with respect to the Jencks Act, vis á vis the answers to government questionnaires, are applicable here. The Jencks Act is not applicable to the Division of Real Estate files for the additional reason that they are state files. The Jencks Act deals only with statements made to agents of the United States government. (18 USCA 3500, subd. (a).) We do not understand the government to contend that there are such statements in the California Division of Real Estate files. Any such statements would be in the files of the United States government.

The subpoena has no bearing upon the suppression of evidence problem except in so far as it shows that the defense made a demand for disclosure of the files. The reality of the situation was that the Division of Real Estate, to whom the subpoena was directed, did not have the files at all. They had been delivered to and used by the United States Postal Inspector in preparation of the government's case. The significance of the facts relating to the subpoena is to show that when it became apparent that the prosecutor had the files, the defense demanded them and the prosecutor refused to disclose them.

There is no requirement that a proper subpoena or that any subpoena be served to require the prosecutor to divulge evidence favorable to the accused. None of the suppression of evidence cases involves a subpoena. At most there is only some type of general request or demand. In *Brady v. Maryland* (1963), 373 U.S. 83, 84 [10 L. ed. 2d 215, 83 S. Ct 1194], the defendant requested to see all of Boblitt's extrajudicial statements made prior to trial. This general demand was held sufficient. In *United States v. Rutkin* (3rd Cir. 1954), 212 F. 2d 641, 644-645, the court said: "Appellant does not allege the contents of the statement with greater particularity, he says, because he has not been able to obtain access to it. In fact, such access is one of the things he is requesting in this court." If the defendant does not know that the evidence exists, there is no requirement to make any demand until he discovers that there was a suppression of evidence. In *United States ex rel. Meers v. Wilkins* (2nd Cir. 1964), 326 F. 2d 135, the defendant had been tried and con-

victed in 1937. In 1961 he discovered that the prosecutor had failed to disclose two witnesses that would have been favorable to him. Habeas corpus was granted. In fact, one case, *Ellis v. U.S.* (D.C. Cir. 1965), 345 F. 2d 961, indicates that even a request for disclosure is not required. In that case it does not appear that any demand for the evidence was made during trial. But the Court of Appeals remanded to inquire into hospital records because the defendant had testified that one of the arresting officers had told him that the victim had been taken to a hospital.

In the case now under consideration, the subpoena is immaterial. It cannot be disputed that the defendants asked to see the Division of Real Estate files, and it cannot be denied that their request was refused. Those files were sealed and have never been disclosed.

## **(2) Impeachment on Collateral Matters.**

In our opening brief we have shown that there was a sharp conflict on important issues between the testimony of Reisman and Block, who was the head of the Division of Real Estate. Reisman claimed that he acted in good faith because he cooperated with the Division of Real Estate in submitting the necessary information for public reports, and that it would not make sense for the Division of Real Estate to issue the reports if they had any evidence of fraud. Block said no one is justified in relying on a public report. It issues as a matter of course based on whatever information is submitted. And Block said that although he was the head of both the Public Report and Investigative Departments, there was still no correlation between the two. The Public Report Section would not even



know that the Investigative Section was making a fraud investigation unless some formal action was taken. The testimony was also in conflict on the question of approval of advertising. Block said they did not approve. Reisman said they did. (App. Op. Br. pp. 62-69.)

The government concedes that there were such conflicts in the evidence. And they do not seriously dispute the probability that the Division of Real Estate files would be useful in resolving these issues. Instead, they say, in effect, that if there is any such evidence it would be immaterial. The government says that Block's direct examination was carefully limited to: "(1) Commission procedures in issuing a public report and Block's contacts with Gamble Ranch in this regard (7039-7060) and (2) that the Commission did not approve Gamble Ranch advertising and was not shown most of it (7061-7065)." (Govt's Br. pp. 60-61.) Then, after saying that this had been Block's direct examination, (and indeed it was), the government contradicts itself. It says that Block's contrary testimony on the question of approval of Gamble Ranch advertising was brought out on cross-examination, and therefore the Division of Real Estate files cannot be used to impeach him on this point because it was a collateral matter. (Govt's Br. p. 63.)

The case cited for this proposition, *McKune v. U.S.* (9th Cir. 1924), 296 Fed. 480, is not in point. The charge in that case was selling narcotics. On cross-examination the defense asked a prosecution witness if she had ever been a prostitute, and she denied it. The defense then sought to prove that she had been a prostitute. The court held that this was a collateral issue



and excluded the evidence. The correctness of this ruling is no longer free from doubt. In *Giles v. Maryland* (1967), 386 U.S. 66 [17 L. ed 2d 737, 87 S. Ct. 793], Justice Fortas said there was a suppression of evidence in failing to disclose subsequent specific acts of misconduct on the part of the prosecutrix because the evidence would have been material to the issue of credibility.

In any event, there can be no doubt that the issue of Division of Real Estate approval of advertising was material in this case. It was not collateral under any definition of the word. Whether the defendants acted in good faith without intent to defraud was an important issue. Whether their advertising had been approved by the Division of Real Estate of the State of California was material to that issue.

Furthermore, our claim that the Division of Real Estate files would have been useful to the defense is not limited to its probable value in cross-examining the Division of Real Estate employees. Block admitted that public reports were issued after the fraud investigation was in progress for some time. He sought to destroy the inference from this that their investigation showed no fraud by saying one department does not know what the other is doing, and he thereby sought to draw the contrary inference that their investigation did show fraud. We are not satisfied with this. We contend that the Division of Real Estate investigation would show no fraud and that the files would contain evidence to support that conclusion. We do not believe Block when he says that each of his two departments is unaware of what the other is doing. What harm could

there possibly be in making that evidence available to the defendants? There is no justification for turning these state files over to the United States government, permitting the government to use them in preparation of its case, and then denying the defense the right to also use the files.

### III.

#### THE PROSECUTOR'S MISCONDUCT.

Appellee asserts that appellant's protests about the prosecutor's misconduct were unfounded, not in good faith, an attempt to cover up guilt by attacking the prosecutor, and exaggerated in number. (Govt's Br. pp. 65-66, 80, 90.) Appellee charges defense counsel with bad faith in raising the possibility of misconduct with reference to the witness Beatie. (Govt's Br. pp. 65, 66.) An examination of the full record on this point discloses no bad faith, only an attempt by defense counsel to protect the defendants from serious prejudice by bringing before the court a possible instance of prosecution intimidation of the witness Beatie. This was done without the jury being present. [R. T. 1542-1548.]\*

The problem raised by defense counsel was that they had been informed the prosecutor told Beatie that if he did not testify as he did before the grand jury the Government would ". . . take steps to take care of the situation." (See Appendix, colloquy). This whole

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\*The pertinent colloquy on this point is reproduced in Appendix A, No. 1.

situation is a graphic illustration of how the secret grand jury proceeding is a deprivation of a fair trial under the Due Process Clause. (See Point V, App. Op. Br.) Beatie was a witness at the grand jury. [R. T. 1547-1548.] There the prosecutor could, in effect, take his “deposition” without defense counsel present. As a participant in the Gamble Ranch venture, Beatie was under duress as a potential defendant. There was every motivation for him to testify so as to please the prosecutor to avoid being formally charged himself. With no defense counsel present to cross-examine Beatie he was necessarily committed to testimony favorable to the government. And, when cross-examination at trial brought out matters perhaps unpleasing to the prosecutor, Mr. Beatie could be subjected to the intimidating threat of a possible perjury prosecution. Defense counsel were absolutely correct in insisting that the matter be inquired into fully by the court without the jury present. Fundamental fairness demanded that because neither side could be damaged. But possible further prejudice to the defendants was a clear possibility in going into the matter “blind” by cross-examination before the jury. The prosecutor, having failed to deny the charge of intimidation at the time it was raised cannot, on appeal, charge defense counsel with bad faith and abuse merely because they sought to protect their clients by demanding the court look into the matter first before it went to the jury.

## The Prosecutor Asked Beatie Questions Insinuating and Suggesting the Existence of Facts in Respect to Which No Proof Was Ever Offered.

Beatie did advertising for Gamble Ranch from about July, 1960 to the latter part of 1961. [R. T. 1465-1468, 1583-1584.] Three times the prosecutor insinuated by his questioning that *during this time* Gamble Ranch was under investigation by the California Real Estate Commission and the Better Business Bureau. [R. T. 1662-1663, 1665.] This questioning was with reference to Government Exhibit 2-1017, a memorandum of January 23, 1961 from defendant Joe Benaron to defendant Samuel Reisman with carbon copy to Mr. Beatie.\*

The whole intent and purpose of these questions to Beatie by the prosecutor was to insinuate to the jury that in January, 1961 there were investigations of the Gamble Ranch by the Real Estate Commission, that defendants knew of these investigations, and were trying to cover them up. [See R. T. 1674-1681 and 1741-1747.] The Court informed the prosecutor that he would have to present evidence to support the insinuations.\*\*

The next day the prosecution presented some documentary evidence which wholly failed to provide any

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\*The pertinent Examination of Beatie and Colloquy of court and counsel on this point is reproduced in Appendix A, No. 2.

\*\*The pertinent colloquy is quoted in Appendix A, No. 3.

support for his insinuating questions. [R. T. 1839-1845.] The court expressed its intention to grant defense counsel's motion to instruct the jury so as to cure the harm done by the prosecutor's insinuating questions. [R. T. 1839-1845.] Still, the prosecutor fought vigorously to preclude court instruction, and then, when the court insisted, attempted, successfully, to get the court to water down the instruction. The innocuous instruction was finally given a day after the damaging, suggestive, and erroneous questions were put. [R. T. 1845.]

The prosecutor's tactic was to suggest by questions the existence of facts he could not prove by testimony. This is prejudicial misconduct. See *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319 (1935); *People v. Hamilton*, 60 Cal. 2d 105, 116 (1963).

### **A. The Consent Agreement.**

The prosecutor argues, on appeal, that when the Consent Agreement [Ex. 1-1125] “. . . was offered and received, the defense made no objection . . .”; that, therefore, the defense “. . . should not be allowed to raise for the first time on this appeal a matter which he did not object to and thus did not give the trial court an opportunity to rule on.” (Appellee's Br. p. 69.)

Under the circumstances here, this is a specious argument. The primary defense in this case was the “good faith” of defendant Reisman, his lack of knowledge of

any misrepresentations by salesmen, and his efforts to eliminate any misrepresentations which were brought to his attention. The record shows that the California Real Estate Commission filed an Accusation charging the Pacific Westates Corporation with misrepresentations in sales of parcels of the Gamble Ranch to California residents. [R. T. 6267-6283.] The *Accusation*, a formal document, was proposed as Government Exhibit 1-1124. In a letter to purchasers, Bertram H. Ross wrote “. . . the company . . . has not at any time been charged with fraud or misrepresentations.” (Appellee’s Br. pp. 70-71.) The indictment charged this statement was one of several made to “lull” purchasers by explaining away unfavorable publicity (Appellee’s Br. p. 71.) Accordingly, the defense stipulated that the Accusation [Ex. 1-1124] had been made, and agreed that the accusatory language could be read to the jury. On this basis the prosecutor accepted the stipulation, read portions of the Accusation into the record, and agreed to, and did, withdraw his offer to introduce Exhibit 1-1124 into evidence. *It was also stipulated that none of the defendants were named personally in the Accusation.* [R. T. 6267-6283.]

The Consent Agreement and Stop Order [Ex. 1-1125] presented an entirely different situation. The defendants personally signed the Consent Agreement, and the Stop Order referred to the Agreement and named the defendants. However, Ross was correct when he stated, in a letter to purchasers, and in his testimony in court, that the Order does not specifically



charge fraud or wrongdoing. (See App. Op. Br., pp. 81-83, 90.) Only Business and Professions Code Section 11018(b) provides for refusal to issue a public report when:

“(b) The sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees.”

The Consent Agreement does *not* specify section 11018(b) as the jurisdictional basis of the Stop Order. It is clear that under the applicable provisions of the California Business and Professions Code that after conducting a hearing pursuant to Business and Professions Code section 10086 the Real Estate Commissioner, upon a sufficient showing, may issue a Stop Order to prohibit sales of subdivision land without showing any fraud. See *Chapman v. Division of Real Estate*, 153 Cal. App. 2d 421, 430 (1957) (and App. Op. Br., p. 90).

Furthermore, Exhibit 1-1125 was only signed pursuant to a good faith agreement between the named signatories and the Real Estate Commissioner that signing the agreement would not constitute an admission of fraud. (See App. Op. Br. pp. 81-83.)

Secure in the knowledge of these facts the defense had *no reason* to object to the introduction of the Consent Agreement—other than its immateriality. In offering Exhibit 1-1125 the prosecutor did not even specify *any purpose* for its reception in evidence.

Accordingly, not realizing that the prosecutor was going to use it as an admission of fraud, the defense did not object. The document was offered and received into evidence early on the morning of May 12, 1965. It reposed among the other exhibits until late in the afternoon of May 12th, when the prosecutor used it during the examination of witness Carey. [R. T. 6454, see App. Op. Br. pp. 91-92.] The improper use the prosecutor made of this evidence, and the reasons for its impropriety are set forth fully in Appellant's Opening Brief at pages 81-93.

It is also clear why the defense did not object before the jury after having been seriously prejudiced. Precisely the same thing happened in *Dunn v. United States*, 307 F. 2d 883 (5th Cir. 1962). There, the prosecutor's misconduct consisted of (1) arguing unfairly that equivocal evidence constituted an admission of guilt; and (2) arguing his personal belief in the defendant's guilt. In *Dunn* the court noted that *the prejudice from such tactics is " . . . magnified in its influence on the jury by an objection and motion for mistrial."* 307 F. 2d at 886. (Emphasis added.) That is precisely the situation here. Defense counsel feared that to object would be to magnify the prejudice. But they did *not* waive the error merely because they decided to present explanatory and defensive testimony to rebut the prosecutor's argument after having decided not to object. It is recognized by the courts that prosecutorial misconduct presents a dilemma to the de-

fense attorney. If he objects he aggravates the matter by emphasizing it to the jury and may appear to be attempting to conceal relevant but harmful evidence; if he decides *not* to object he is apt to be charged with waiver of the error. Accordingly, the courts do not require a particularized objection where defense counsel may have feared to object because “. . . an objection would only focus attention on an aspect of the case unfairly prejudicial to his client.” *United States v. Sawyer*, 347 F. 2d 372, 374 (4th Cir. 1965); *Dunn v. U.S.*, 307 F. 2d 883, 886 (5th Cir. 1962); *Ginsberg v. U.S.*, 257 F. 2d 950, 955 (5th Cir. 1958). Furthermore, under Rule 52(b), Federal Rules of Criminal Procedure:

“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

The prosecutor’s use of the Consent Agreement was plain and prejudicial error under Rule 52(b).

The prosecutor argues that if there was error it was not due to any misconduct on his part. (Govt’s Br. p. 68. We disagree. The prosecutor’s only excuse for his misconduct in this regard is that it did not necessarily harm defendants because the jury could disregard the government attorney and believe the defense witnesses! (Govt’s Br. p. 71.) In his desire for a conviction here the prosecutor has so blinded himself to the proprieties that he has had the temerity to suggest at pages 69 and 70 of his Brief that the Consent Agreement was not even offered as an admission

of fraud, while at pages 71 and 72 he quotes portions of the record where he clearly argued just the contrary to the jury.

**B. The Circumstances Did Not Excuse the Prosecutor's Devious Attempt to Prejudice Appellant by Wrongfully Exposing a Co-Defendant's Conviction.**

The cases cited by the prosecutor at page 77 of Appellee's Brief do not justify what was done here in the name of impeaching the witness Clejan. (See App. Op. Br. pp. 95-102, and Appellee's Br. pp. 73-79.) In *United States v. Murray*, 297 F. 2d 812 (2nd Cir. 1962) and *Meeks v. United States*, 179 F. 2d 319 (9th Cir. 1950), the witness was impeached by a showing of a felony conviction in *another case*. Here the conviction shown arose out of the same indictment under which appellant was being prosecuted. In *United States v. Jannsen*, 339 F. 2d 919 (7th Cir. 1964) and *United States v. Vasquez*, 319 F. 2d 381, 386 (3rd Cir. 1963) it was not brought home to the jury, as here, that the witness' conviction was a result of the same charge for which the defendants were being prosecuted. *Davenport v. U.S.*, 260 F. 2d 591 (9th Cir. 1958) is distinguishable because there it was defendants who were the cause of the jury learning of the pre-trial guilty plea of a co-defendant named Errion; defense strategy was to place all the blame on Errion; accordingly, the jury was not prejudiced towards defendants by finding out about Errion's plea of guilty. In *Wood v. United States*, 279 F. 2d 359 (8th Cir. 1959) the co-defendants decided to plead guilty *during* trial so that it was clearly incumbent on the court to inform the jury of the plea to explain their disap-

pearance from the case. In *Wood* the court gave a proper cautionary instruction to the effect that the co-defendant's guilty plea raised no inference as to guilt of the remaining defendants.

In *United States v. Freeman*, 302 F. 2d 347 (2nd Cir. 1962) the court noted that generally the prosecutor vouches for his own witness and thus may be obliged to reveal matters affecting their credibility, such as felony convictions. In *Freeman* the court noted the exceptions to this rule, saying:

"There may be circumstances where, on proper request of the defense, the trial judge should limit, or even bar such testimony or allow it only under cautionary instructions because the prejudice to the defendant of the witness' admission of crime implicating the defendant would outweigh the advantages of a full disclosure of the witness' criminal background."

*Freeman* found no likelihood of prejudice in that case because

"It must have been crystal clear to the jury that [the witness in question] had [previously] pleaded guilty to the [same] offense [in the state court]."

But *Wood* and *Aronson* cited by Appellee apparently ignored the command of the United States Supreme Court in *Grunewald v. United States*, 353 U.S. 391, 420, 1 L. Ed. 2d 931, 952 (1957). *Grunewald* clearly disapproves the practice of disclosing a co-defendant's admission of guilt. (See App. Op. Br. pp. 98-100.)

Here, the circumstances do not allow any other conclusion than that the prosecutor was guilty of misconduct. He asked the court's permission to impeach

Clejan only for surprise and damage due to allegedly unexpected testimony inconsistent with what he had anticipated. But the prosecutor went further; he impeached beyond the point of surprise; he exceeded the license given him by the court, and did so in a devious manner without warning.

**C. The Prosecutor Insinuated Without Basis That the Witness Roche Had Been Subjected to Criminal Prosecution for Fraudulent Advertising.**

At trial the prosecutor attempted to justify his insinuation that Roche had been guilty of mail fraud in other cases. The prosecutor asserted that the basis for his prejudicial question was a case in this circuit in which Roche

“ . . . had advertising which [was] the subject of prosecution for misrepresentation.” [R. T. 14246-14247; see App. Op. Br. p. 104.]

Appellant's Opening Brief identified the case referred to by the prosecutor—*Harris v. United States*, 261 F. 2d 792 (9th Cir. 1958)—a mail fraud prosecution where defendants had employed Roche as an advertising man for their desert real estate subdivision. Roche's “involvement” was only as a witness—not as a defendant. Roche was not even indicted in *Harris*. Appellee does not deny that the prosecutor was referring to the *Harris* case. The attempt to discredit Roche is thus exposed as the work of a prosecuting attorney who knew full well that there was no legal basis whatsoever for his question, which had no probative value whatsoever, *unless to insinuate that Roche* was at least a party to fraudulent advertising in a prior mail fraud case. The tactic necessarily prejudiced Appellant by implanting



in the minds of the jurors the idea that Appellant here had selected Roche for his supposed talent for fraudulent advertising. The prosecutor's admission makes it clear that the attack on Roche was not inadvertent, but a calculated attempt to influence the jury by an insinuating and improper question, *i.e.*, the false suggestion that Roche had been prosecuted for mail fraud.

**D. Appellee's Brief Does Not Demonstrate Any Good Cause for the Prosecutor's Personal Attack on Defendant Reisman's Integrity and Credibility.**

The prosecutor implied that Reisman could not truthfully testify under oath that he had not tampered with a government file, and stated for the benefit of the jury that Reisman's testimony on another point could not be impeached only because of the death of the only party able to contradict him. (App. Op. Br. pp. 109-113.) The prosecutor counter-attacks by asserting that "several false statements [were] made by Reisman" (Appellee's Br. p. 80), but fails to cite any place in the record to support the contention Reisman testified falsely. The prosecutor also denies he accused Reisman by specific use of the word "perjury". (Appellee's Br. p. 80.) However, in view of what he did say and imply it was obviously unnecessary for him to use such words to communicate to the jury his impression that Reisman's credibility and integrity were suspect for reasons the prosecutor broadly hinted at. The vice of the prosecutor's tactic is clear; being unable to present competent evidence to impeach Reisman he resorted to innuendo. That is misconduct. *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319 (1935).

### **E. The Prosecution Cast Aspersions on Defense Counsel's Integrity.**

At page 81 of Appellee's Opening Brief the caption denies any accusation was made that defense counsel tampered with the evidence. But at pages 83-84 of the same Brief the prosecutor makes it clear he didn't mean what he said in the caption and reiterates the insinuation that defense counsel's handling of the documents was either highly improper or outright tampering. Such attacks on the integrity of opposing counsel are disapproved as misconduct amounting to reversible error where, as here, there is no basis for the aspersions. *Berger v. United States*, 295 U.S. 78, 88, 79 L. ed. 1314, 1321, 55 S. Ct. 629 (1935); *New York Central R. Co. v. Johnson*, 279 U.S. 310, 316-318, 73 L. ed. 706, 710, 49 S. Ct. 300 (1929).

### **F. The Prosecutor Admits He Read to the Jury Prejudicial, Inadmissible and Inflammatory Matters From Complaint Letters.**

The letters read into the record by the prosecutor and reproduced at pages 86-88 of Appellee's Brief contain matters which were clearly and exactly what Appellant described them to be—inadmissible and inflammatory material quite likely to arouse the sympathy of the jury for the "victims". The prosecutor does not deny the prejudicial character of these letters; he states that

" . . . when he realized what he was reading he stopped." (Appellee's Br. p. 88.)

The record reveals this material was not read by inadvertence; the prosecutor said in open court that he had carefully selected only the material that was pertinent because he was compelled by the court to limit his

reading to the jury, to be selective; that he would employ only “. . . selected files of complaint letters . . .” from which he “. . . had made up a list of the ones [he] wanted to read from.” [R. T. 6333-6338, 6370-6371, and especially 6333 and 6338; App. Op. Br.] This is prejudicial misconduct. *Beck v. United States*, 33 F. 2d 107, 113 (8th Cir. 1929); *United States v. Grayson*, 116 F. 2d 863 (2nd Cir. 1948).

**G. The Prosecutor Used Incompetent Matter to Assert That All Out-of-State Land Subdivisions Are Fraudulent.**

Appellant's Opening Brief points out the following improper misconduct by the prosecutor; assertions that a well-informed buyer would not pay the asking price for Gamble Ranch parcels; that other subdivisions selling for comparable prices resulted in mail fraud prosecutions; that the California Real Estate Commissioner referred to most out-of-state land developments as “fraudulent schemes”; that such reference necessarily included Gamble Ranch; that defendants were “con men” who were “fleecing the public.” (App. Op. Br. pp. 123-134.) The prosecutor does not deny that it was his intention to leave the impression that such hearsay charges against other parties not before the court were also applicable to defendant. The prosecutor admits that

*“The obvious purpose of the prosecutor's question[s] was to test the credibility of Reisman's ‘good faith’ defense by inquiring if upon reading the article he did not realize that he might be engaged in a promotion which was deceiving purchasers.”* (Appellee's Br. p. 90.)

The prosecution's bald-faced assertion that the misconduct cases cited in Appellant's Opening Brief are not relevant is the only way he could attempt to explain away his inexcusable and prejudicial misconduct. There is not the slightest attempt to distinguish *any* of these cases. This court should hold that the prosecutor's misconduct, in and of itself, requires reversal.

#### IV.

#### THERE IS NO EVIDENCE IN THE RECORD TO SHOW ANY PARTICIPATION IN THE GAMBLE RANCH ENTERPRISE BY APPELLANT REISMAN BEFORE MAY 24, 1960 AND AFTER JUNE 15, 1962.

Appellee states that "the date [appellant Reisman] became a shareholder does not reflect the date he joined in the scheme." (Appellee's Br. p. 91.) It may be asked, what evidence is there to show he joined the "scheme" before that time? The triers-of-fact had to look to all the circumstances to determine when Reisman became an active participant with a proprietary interest in the Gamble Ranch promotion, rather than merely the attorney for one of the active participants, defendant Benaron. In an effort to show Reisman's participation at all times named in the indictment, appellee has reported the evidence inaccurately.\*

The prosecution goes so far as to imply in its argument that Reisman was a participant in the venture before October 13, 1959, even though the trial court ruled to the contrary in granting Reisman's motion for acquittal as to Counts II and III of the indictment. (See

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\*The testimony will not be quoted verbatim in the text, but will be reproduced as Appendix B to have complete citations in accordance with Rule 18(2)(d).

App. Op. Br. p. 137; Appellee's Br. pp. 91-92.) Since the government has not appealed from the judgment of acquittal as to Counts II and III, appellant will not argue Reisman's nonparticipation prior to October 13, 1959, except to point out that the testimony of B. M. Stewart does *not* indicate whether his meeting involving Reisman, Stewart and Clejan occurred in September 1959, (Appellee's Br. p. 91), or October or November, 1959, or any time before mid-December, 1959. [See R. T. 951.]

The testimony of Albert H. Allen was cited by appellee to prove the contention that Reisman was in close touch with the promotional activities of Allen and Clejan in October, 1959 (Appellee's Br. p. 91), a time when Reisman was traveling in Europe. [R. T. 12,942-12,944.] Closer inspection of Allen's testimony shows he refused to testify positively that Reisman was advised in October, 1959, of Allen's efforts on behalf of the venture. Allen testified that he did not have "... any independent recollection" of Reisman's whereabouts in October, 1959. [R. T. 1094.]

The testimony of witness Block of the Real Estate Commission does not establish that Reisman was acting on behalf of the Gamble Ranch venture in any meeting with Block before issuance of the original stop order on November 6, 1959. Block's testimony was only that Reisman came to see Block with Albert Allen but that Mr. Allen, not Reisman, actually appeared to be representing Clejan, then the promoter of Gamble Ranch. [R. T. 7150-7153.]\*

Appellee inaccurately states that on *November 6, 1959*, Reisman, Benaron and Byrnes "met and dis-

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\*The pertinent testimony of Block is reproduced in Appendix B hereto, as number 1.



cussed the [Real Estate Commission's] 'stop order' . . ." (Appellee's Br. p. 92.) The record actually shows merely that Allen did not recall whether he himself saw the Real Estate Commission's stop order of November 6, 1959, *on that date*, because the "stop order" was not delivered to his office until late on Friday, November 6, 1959, and on Sunday he went to the hospital where he stayed for three weeks. Allen merely testified that he did discuss the "stop order" with Clejan (and perhaps with appellant Reisman), but it is clear from his testimony that this must have been some time after November 6, 1959,\* and that he may never have discussed it with Reisman at all. [R. T. 997, 998, 999, 1009, 1010.]

Appellee states, ". . . Reisman conferred with water engineer Stetson in December, 1959." (Appellee's Br. p. 92.) Stetson's testimony is only that he may have spoken to Reisman on the telephone in January, 1960. [R. T. 10,000-10,001.]\*\*

Appellee implies that Reisman's resignation as an officer and director in June, 1962, must be deemed "merely a formality" because S. Weiss was asked to assume the presidency of the Gamble Ranch Company under circumstances showing that *other* officers and directors continued to have an interest in the project. (Appellee's Br. pp. 92-93.) This is a distortion of the testimony. It is clear from the testimony cited by appellee that Reisman simply was no longer "in the picture" after June, 1962, that the only parties remaining behind the scenes were Benaron and Byrnes;

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\*The pertinent testimony of Allen is reproduced in Appendix B hereto, as number 2.

\*\*The pertinent testimony of Stetson is reproduced in Appendix B hereto, as number 3.



that Reisman took no further part of any kind in the activities which led to S. Weiss' appointment as President. [R. T. 4680-4683.]\*

Appellee argues that the evidence proves Reisman was a participant in the "scheme" [Gamble Ranch venture] at all times named in the indictment. The evidence shows that before June, 1960, he acted only as an attorney, and had no proprietary interest in the company; that between December 1959, and June, 1960, though an officer and director he had no involvement in day-to-day business affairs of the company and no proprietary interest; that between June of 1960 and June of 1962, though still acting as an attorney, he also became somewhat involved in day-to-day affairs and had a proprietary interest. On such a record, it was improper to convict him of the counts specified in Appellant's Opening Brief, page 137, since there is no evidence of conduct of Reisman as a "principal" or financially interested party before June, 1960, and after June, 1962.

The cases cited in Appellee's Brief, pages 93-94, do not meet the point raised by these facts and appellant's citation of *Levine v. United States*, 383 U.S. 265, 15 L. ed. 2d 737, 86 S. Ct. 925 (1966). Appellant contends that the failure of the trial court to limit the evidence as to those counts before May 24, 1960 and after June 15, 1962, seriously prejudiced him as to the remaining counts, in that the failure of the court to strike the evidence and limit the proof permitted the jury to conclude, as was urged by the government, that appellant was a party to the scheme from the *first* to the *last mailing*.

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\*The pertinent testimony of S. Weiss is reproduced in Appendix B hereto, as number 4.

V.

THE TRIAL COURT'S REFUSAL TO PERMIT APPELLANT TO EXAMINE THE GRAND JURY MINUTES BEFORE TRIAL DEPRIVED APPELLANT OF DUE PROCESS.

The government brief does not challenge appellant's argument that Criminal Rule 6(e) is unconstitutional. It merely points out that "Rule 6(e) . . . cloaks the transcript with secrecy." (Govt's Br. p. 94.) The government does not deny that it is fundamentally unfair to permit the prosecution to use the minutes while denying the accused that right. The government does not deny that appellant was unable adequately to prepare for this trial because he was not permitted to use the transcript. The government does not deny appellant's contention that the traditional reasons given for maintaining secrecy have no application after an indictment is returned. The government merely points to the Rule.

Appellant will not repeat arguments that are not disputed. The government is confident that this Court will preserve a policy of secrecy that is conceded by all to be unfair and unfounded.

**Conclusion.**

For the foregoing reasons the judgment of conviction should be reversed.

BALL, HUNT, HART & BROWN,  
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FREDERIC G. MARKS,  
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### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARENCE S. HUNT









## APPENDIX A.

### Transcript References Regarding Misconduct.

1. Colloquy regarding intimidation of Beatie [R. T. 1542-1548]:

“Mr. Rothman: . . . we have a long way to go in this trial with a lot of witnesses and if the Government is going to meet with each one—

The Court: Well, the Government will undoubtedly meet with each witness. They wouldn't put on a witness without knowing what they are going to testify to.

Mr. Rothman: I didn't finish—

The Court: I am sure you would do the same.

Mr. Rothman: I didn't finish the thought. That is correct, if your Honor please. I mean if they meet with the witnesses and suggest to them that if they don't testify in a certain way that certain things might happen to them, I suspect we are going to be running into some constitutional problems.

The Court: There is no question about that. Mr. Nissen, you are not threatening witnesses, are you?

Mr. Nissen: Your Honor, I would like to stand on the witness' sworn testimony and the testimony of the people in my office. I don't think I should be required to answer until somebody—

The Court: If the witness indicates from the stand that they have been threatened, I will strike their entire testimony.

Mr. Nissen: I am going to ask you first, your Honor, to hold a hearing to determine whether it is

so, because there were other people present besides myself and the witness.

I don't think the problem here—again we are having a problem raised that doesn't exist and it has happened throughout the trial and we don't think the court should take the time to go into it here. They can certainly do it with the witness on the stand.

The Court: Yes. You can cross-examine the witness on these things.

Is that all, now?

Mr. Hunt: I think not. I have not talked directly with Mr. Beatie, but I feel that from the conference I have had that there is an indication which is not cured by cross examination. If Mr. Nissen says he believes—he is perfectly willing there be a record made, I would not be averse to having Mr. Beatie asked if he would relate just what his conversation was and we find out what it was.

The Court: You can do that on cross examination.

Mr. Hunt: But, your Honor, the vice of that is that this is a matter which I feel goes to the very crux of the system of a fair trial.

The Court: I agree with you, Mr. Hunt.

Mr. Hunt: *We can't do it on cross examination for this reason: I think this is the time to find out what, if anything, was said by the Government. If there is nothing to it, that is the end of it. If there is something to it, then I think we should know it now.* (Emphasis supplied.)

Mr. Nissen: All right. If we are going to try what has been said to the witness we are going to

bring back the last three witnesses and ask what the defendants said to them in the hall during recess about changing their stories and refreshing their recollections, and so forth, which would be just as immaterial.

The Court: I think it is appropriate to proceed. You ask the witness anything you want on the stand. It will come out on the stand and be the record, and that will be it, and I will govern myself accordingly on instructions to the jury with respect to the witnesses. If necessary, we might have to hold some—

Mr. Hunt: I would like to make an offer of proof on what I am advised the facts are at this time for the record.

The Court: All right.

\* \* \*

Mr. Hunt: That Mr. Beatie had a conference with Mr. Nissen—I believe Mr. Jacobson was there and I do not know who else was there—at which time Mr. Nissen stated in substance to Mr. Beatie that if he did not testify to the same things that he testified before the Grand Jury that the Government would take steps to take care of the situation. That is my offer of proof.

The Court: All right.

Mr. Hunt: Now, your Honor can see that if that is the circumstance and the situation, that is not an instruction or a request that a witness testify truthfully, because a witness may be mistaken. That is all I have to say at this time.

The Court: All right. He can explain that. Let's get the jury down and proceed."

2. Testimony and colloquy regarding insinuating questions asked Beatie:

The memorandum to Beatie referred to—Plaintiff's Exhibit 2-1017—states that a letter of Beatie to a San Diego television station refers to

"... some ad-libbing to be done by one of the announcers. I am extremely concerned that something the announcer might say would not be in accordance with our wishes, and we might find ourselves in trouble with the land commission. I sincerely believe that any and all of the advertising we do should be canned commercials. By a copy of this letter I ask Ernie Beatie to instruct all of these radio and television stations to *only* use commercials approved by your office. There should be no deviation from these instructions." [R. T. 1510-1512, Govt. Ex. 2-1017.]

Later, Beatie was questioned as follows:

"By Mr. Nissen: Q. With respect to Exhibit 2-1017, advising you by Mr. Benaron's memo that you must not ad-lib or ad-libbing must not be done, Mr. Rothman asked you, wasn't this before any investigation by the Post Office.

Now, sir, to your knowledge, or were you advised by any of the defendants or any Gamble Ranch employee, or did you so advise them that in fact you were aware of Real Estate Commission and Better Business Bureau inquiries into land sales?

Mr. Rothman: Your Honor, please, I make the same objection heretofore made, that it assumes facts not in evidence. For the same reasons I in-

dicade to the court I wanted to establish, I object to the question. I think it is highly improper.

The Court: No, I think it is all right so far. The objection is overruled.

\* \* \*

Mr. Nissen: Q. Mr. Beatie, did the defendants in this case or any of their employees ever advise you they were aware of Better Business Bureau or Real Estate Commission investigation into land sales?

Mr. Hunt: Your Honor please, I don't understand that line of questioning. I object to it as highly prejudicial. It is misconduct.

The Court: He says he will connect it up.

\* \* \*

Mr. Rothman: Your Honor please, it is going beyond my cross examination and, secondly, there isn't any showing nor will there be any that there was any knowledge on the part of these defendants there was any investigation.

Merely because counsel says he is going to tie it up is not going to cure the defect in this case when he can't tie it up to these defendants.

Mr. Nissen: *There is a document already in evidence, your Honor, which states as to carbon copies to all defendants that there are Better Business inquiries and so forth. It is already in.*

The Court: That is in evidence now?

Mr. Nissen: Yes.

The Court: From whom?

Mr. Nissen: Mr. Beatie.

The Court: To whom?

Mr. Nissen: The defendants named on the paper, your Honor. I believe Mr. Reisman, Mr. Benaron, Mr. Byrnes and Mr. Escarzaga.

The Court: All right. Objection overruled.

Mr. Hunt: From Mr. Beatie?

Mr. Rothman: I don't know what document they are referring to.

Mr. Nissen: *I can find it.*

The Court: *Find it at recess.*

By Mr. Nissen: Q. Do you recall that question so long ago, Mr. Beatie?

Mr. Beatie: A. No sir, I don't.

Mr. Nissen: Q. *Did any defendant here or any of their employees advise you they were aware of investigations into land sales either by the Real Estate Commission or the Better Business Bureau?*

A. At what time sir?

Mr. Hunt: The court please,—

By Mr. Nissen: Q. Any time. A. Up until now?

The Court: You have made your objection. I overruled it.

Mr. Hunt: Any time up to now. Of course, he knows now.

By Mr. Nissen: Q. During the time you were employed by them to do advertising.

The Court: During the time you were employed to make up these commercials.

The Witness: I was aware there were inquiries through the Better Business Bureau, yes, sir.

The Court: Did the defendants tell you that?

The Witness: The defendants in this room, no, sir.



The Court: All right." [R. T. 1662-1665, Emphasis added.]

3. Further colloquy regarding insinuating questions asked of the witness Beatie:

"The Court [to Nisson]: You shouldn't ask a question unless you know what you are talking about.

Mr. Nissen: During the time Mr. Beatie was representing these people in advertising.

The Court: This is in January that he is talking about.

Mr. Nissen: I would have to get the letter, your Honor.

The Court: Be sure when you ask these questions, particular—those are damaging questions to ask unless you are sure and you are able to show these things existed and the defendants knew about them.

Mr. Nissen: All right.

The Court: To ask him a question, 'Did they tell you something,' and then you don't know and you are not able to show that these things existed and that they knew about them isn't fair, in my judgment." [R. T. 1678.]

When the prosecutor failed to present such evidence defense counsel requested a cautionary instruction to the jury and the following occurred out of the presence of the jury:

"\* \* \*

The Court: Is there evidence that there was any investigation by the Real Estate Commission or the Better Business Bureau in January 1961?

Mr. Nissen: No, sir, and our question asked nothing about that. We did not ask that.

The Court: Your question didn't specifically say that, but I think that was the import of your question, Mr. Nissen, so I have to clear it up. I have to clear it up.

If you have any evidence there was a Real Estate investigation—an investigation by any Real Estate Commission or Better Business Bureau being conducted—any investigation being conducted in January 1961, why, tell me.

Mr. Nissen: Yes, I would be happy to as soon as I locate the exhibit, your Honor.

The Court: All right. Then have it for me in the morning, what you are relying on and what you expect to prove, if you do, that there was investigation going on of the Gamble Ranch in January 1961 by any Real Estate Commission or the Better Business Bureau." [R. T. 1748-1749.]

## APPENDIX B.

### Testimony Regarding Dates and Times of Appellant Reisman's Participation in the Gamble Ranch Venture.

1. Testimony of Henry Block [R. T. 7150, line 2, to R. T. 7152, line 5]:

"Q. [by Mr. Hunt] Mr. Block, is it not true, sir, that after the stop order, as you call it, and which is a shorter name for the cease and desist order, after that order of November 6th was written and signed by you and delivered, is it not true that Mr. Reisman, after you had received further correspondence from Mr. Allen, you first saw Mr. Reisman in your office in which he told you he was representing Mr. Benaron and some others who were purchasing an interest in this property, and he was there at their request, isn't that true? A. My recollection is that I had seen him in the company of Mr. Allen prior to that time.

Q. Do you have anything in writing by way of correspondence, memoranda, notes, or anything to confirm your recollection, sir? A. Nothing other than my recollection. I recall it very vividly, sir.

Q. All right. You say you recall it very vividly. Do you recall having received a letter under date of November 9, 1959, from Mr. Allen relative to this matter? A. November 9, 1959, sir?

Q. Yes. A. I don't recall that, no, sir.

Q. I think I have a copy. I think it is a file, 1-238.

Mr. Reisman: B-2.

Mr. Hunt: B-2?

Mr. Reisman: B-2, yes.

Mr. Hunt: I have a copy here.

Q. It is a rather long letter from Mr. Allen.  
A. Yes, I recall this letter, sir.

Q. All right. Now it is true, is it not, sir, that you at no time prior to the receipt of that letter from Mr. Allen had any conversation with Mr. Reisman and Mr. Allen or Mr. Reisman, or Mr. Reisman with anybody else, in connection with this matter? A. To the best of my recollection before this letter was received we had had a visit from Mr. Allen and Mr. Reisman, sir, as described earlier.

Q. I invite your attention here to this copy of Exhibit 1-238, which is a letter under your signature, directed to Mr. Allen, Mr. Clejan, under date of November 10, 1959. A. Yes, sir.

Q. Do you see any reference in any of this correspondence at all to any conferences that you had had where Mr. Reisman was present? A. We wouldn't have noted them in the order to desist and refrain. As I indicated Friday, in the visit when Mr. Allen and Mr. Reisman came in, Mr. Reisman's relationship was not made known to me. I did not know whether he was an associate of Mr. Allen, a friend of Mr. Allen. I did not know why he came other than he appeared to take the position, as I understood it, that Mr. Allen on behalf of Mr. Clejan should complete the filing."

2. Testimony of Albert Allen. [R. T. 997, line 24, to 998, line 21; R. T. 999, lines 7-9, R. T. 1009, line 20, to 1010, line 15]:

"The Court: Mr. Allen, did you discuss any of these letters with Mr. Benaron or Mr. Reisman or Mr. Byrnes?

The Witness: I don't believe I did discuss the letter of November 13th and the letter of Novem-

ber 10, 1959. I am not certain that I saw it at that time or that I discussed it, because if I may explain, your Honor, the letter from the California Commissioner of Real Estate, dated November 6th, my recollection is it was delivered late on a Friday afternoon of November—which was November 6th, and I went into the Cedars of Lebanon Hospital, I believe, on the 8th November for surgery. And I didn't get back to the office again for a period of approximately three weeks, maybe three and a half weeks.

So I don't recall at this time whether I ever at that time saw these letters or not. I do recall the letter from the Commissioner of Corporations. I do not recall the response or the letter addressed to me of November 10th. If the November 10th—

The Court: What about the letter of November 6th, did you discuss that letter with these gentlemen?

The Witness: Yes.

The Court: Mr. Byrnes, Mr. Benaron, Mr. Reisman?

The Witness: Yes, sir.

The Court: 1-238 and 2-992 are ordered in evidence subject to the motion to strike.

(Documents marked Plaintiff's Exhibits 1-238 and 2-992 were received in evidence.)

The Court: All right

Q. [by Mr. Nissen] Sir, what was the discussion or the substance of the discussion that you had with Mr. Byrnes, Benaron and Reisman with regard to 1-237, the Commission's order?

\* \* \*

To your knowledge, sir, was the matter of soil testing ever discussed with any of the four principals and, if so, at what time? A. I couldn't honestly say or recollect at this time whether such discussions did take place. I vaguely remember some reference to the letter, but I just cannot honestly state whether there was a general discussion concerning that.

Q. During your discussion as to how to answer the Commissioner's order, do you recall, sir, whether any of the four people we have been talking of mentioned an answer, an appropriate answer to that paragraph? A. There was a general discussion concerning the letter and the manner of answering it and the action that was to be taken. Primarily these discussions were, I believe, with Mr. Clejan, who was directly involved at that time as being the most substantial owner or investor in this venture. I think he was the one that was the prime mover, but I believe there was a general discussion concerning its contents and the method of answering it among all the parties."

3. Testimony of Thomas M. Stetson [R. T. 10,000, line 23 to R. T. 10,001, line 21]:

"Q. Now, those early meetings relative to your retention were with which members of the Gamble Ranch organization? A. Our initial meeting was with Mr. Clejan and I think Mr. Byrnes was at one or two of the meetings.

As I recall, prior to our initial report, those were the gentlemen that we had our dealings with. And Mr. Reisman—I am not sure whether we met directly with Mr. Reisman or talked to him by telephone.



But at least during the course of our study we did contact Mr. Reisman.

The Court: You mean before your initial report?

The Witness: No—I am not sure whether we had direct contact with Mr. Reisman before the report or at the time we were actually preparing the report and had presented the report.

In other words, I am not sure whether we met with Mr. Reisman before we went up into the field to make a field investigation.

The Court: Do you remember about when it was that you first had contact with Mr. Reisman?

The Witness: Well, it was about January of 1960.”

4. Testimony of S. Weiss [R. T. 4680, line 23, to 4683, line 24]:

“Q. I believe, Mr. Weiss, you gave us the date upon which you took over duties as a vice-president and as a present.

Now, could you tell us, please, what individuals made you vice-president, sir, and if there was any conversation between you and these people about your taking that job? A. Yes, I was first asked by John Carey, who was then the president of Gamble Ranch, if I would become an officer, director of the Pacific Westates—I guess he was the president of the Pacific Westates.

I told him that I was not particularly inclined to because I knew there was an investigation going on and I did not want to be involved.

This was a few days prior to a meeting of stockholders and directors that was held by Pacific

Westates. And at that time I was asked to attend the meeting in which—at which were present several of the stockholders.

Q. Would you name them for us, please? A. Yes, sir.

There was Mr. Benaron and Mr. Byrnes. I don't believe Mr. Reisman was present.

Q. Anybody else? A. Yes, Mr. Rothman sitting at counsel table and Mr. Ross, Bert Ross, and I believe there were several other attorneys.

I could be mistaken about the name, but I think that Mr. Allen, Albert Allen was there.

It has been some time ago, but I think Mr. Finell of Mr. Rothman's office was there. I couldn't say for sure.

Q. What was the conversation, if any, about your taking an office in the Company? A. I was asked to take the office of Vice-president-director of the Company.

I restated my position, I knew there was a Federal investigation being conducted at the time and I didn't want to become involved in it.

They told me that I absolutely would not be involved and this was the unanimous consensus of the opinion and legal counsel of all the attorneys present.

I believe, if I recall, there were four or five attorneys present. They said they wanted me to serve as a caretaker or administrator because I knew people at the Ranch, running the Ranch, such as Mr. Mueller and the Blackwells handling the motel.

That they needed someone to handle the affairs of the Ranch and take care of it and see that the clients got up to the motel. They assured me on a number of occasions I would not be involved and I would be fully protected, and I really would be doing quite a service to all the clients, to continue on with this particular—if I would take the officership of the Company.

Q. After you had the vice-presidency, sir, you say you became president in about December '62?

A. That is correct.

Q. Will you tell us, sir, what individuals, if any, requested you to take that particular office and who and what was said to you? A. I was asked to become president in December 1962. Mr. Benaron asked me if I would accept the presidency of the Company.

Some discussion was had relative to it. I was told that I was really needed very badly and that I was the only one that really knew anyone and had to continue on the Ranch operations, and that the clients really needed me as well as, you know, the Company itself.

That I was being put into a position that I would be doing them a grave disservice to resign—or not to accept the presidency at that particular time.

Q. Was there any discussion, sir, by Mr. Benaron as to why Mr. Reisman, Mr. Byrnes and Mr. Benaron were not willing to be president at that time? A. As I recall, there was some discussion that they had to resign. I guess probably because of this particular investigation. Apparently, it would not be satisfactory to have them continue."



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

RUFUS EARL DAVIS,

Petitioner and Appellant,

vs.

WALTER DUNBAR, LAWRENCE E. WILSON,  
and THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Respondents and Appellees.

No. 21783 ✓

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS  
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 )

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APPELLEE'S BRIEF

JURISDICTION

Petitioner and appellant has invoked the jurisdiction of this Court under Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

In an information filed by the District Attorney of Los Angeles County, petitioner was charged with having violated Penal Code section 217, assault with intent to commit murder, on or about February 20, 1964 (CT 1).<sup>1/</sup>

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1. "CT" refers to Clerk's Transcript of the Los Angeles Superior Court.



In count two, he was charged with having violated Penal Code section 220, assault with intent to commit rape, on or about February 20, 1964. Appellant entered a plea of not guilty. Appellant personally and all counsel waived a jury trial. Appellant was found guilty of assault with a deadly weapon, a lesser included offense within that charged in count one. He was found not guilty of count two. Appellant's motion for a new trial was denied. Probation was denied. Appellant was sentenced to the state prison for the term prescribed by law (CT 15, 16). Appellant filed a notice of appeal from the judgment and order denying his motion for a new trial. The California Court of Appeal, Second Appellate District, Los Angeles, California, affirmed the judgment on July 6, 1965, in an unpublished opinion, a copy of which was marked "Exhibit B" in respondent's return to the order to show cause.

Petitioner sought a hearing in the California Supreme Court and said petition was denied on September 2, 1965. People v. Davis, Case No. 10385. Petitioner sought a review in the Supreme Court of the United States and his petition for a writ of certiorari was denied on January 17, 1966. Davis v. Dunbar, No. 681, Miscellaneous, October Term, 1965.

Petitioner next sought habeas corpus in the California appellate courts. Said petitions were denied





without opinions by the Court of Appeals on February 5, 1966 (In re Davis, Crim. No. 4944) and by the California Supreme Court on March 9, 1966 (Davis vs. Dunbar, Case No. 9814). See "Exhibit C."

Petitioner's direct appeal to the California courts was limited to the sole question of whether the trial court had erred in receiving into evidence statements made by him after his arrest.

B. Proceedings in the federal courts

On November 1, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. On November 1, 1966, an order to show cause was issued, and on December 9, 1966, appellee, respondent below, filed a return to the order to show cause and points and authorities in opposition to habeas corpus. On or about December 21, 1966, appellant filed a traverse.

On March 8, 1967, Judge Zirpoli of the District Court filed his order denying the writ.

On March 10, 1967, appellant filed a notice of appeal, and on April 6, 1967, Judge Zirpoli granted leave to proceed in forma pauperis and issued a certificate of probable cause.

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## STATEMENT OF THE FACTS

The evidence supporting the charge of assault with a deadly weapon to which petitioner was found guilty in the Superior Court of Los Angeles County is set forth in the reporter's transcript of the trial, a copy of which was introduced in evidence at the hearing before Judge Zirpoli (certificate of clerk to record on appeal).

### A. People's case

Hazel Eden, who was 79 years old, testified that a few days prior to February 20, 1964, she rented a room to appellant. On that date, appellant threw her on the floor as she came out of the bathroom that she shared with him. Appellant said: "I am going to like it here, I think I will stay." While on the floor, appellant wrestled with her. He tried to get under and unfasten her clothing. The hooks and eyes were torn off her skirt. A sleeve on her blouse was ripped. Appellant rubbed up against her with his private parts. Eden screamed and hollered. She was unable to recall what occurred subsequently because she lost consciousness. She stated that there was no one else in her house when the foregoing events occurred (RT 96-100, 119, 126, 134).<sup>2/</sup>

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2. "RT" refers to Reporter's Transcript of the Los Angeles Superior Court.



William Phelps, a police officer with the City of Los Angeles, testified that on February 20, 1964, he received a radio call to investigate a crime at 4309 Burns Avenue. When he arrived at 8:40 p.m., Mr. and Mrs. Castro gave him a key to the east front door of a duplex (RT 6-8). He opened the door which was secured by a night chain part way. He noticed appellant lying face down on a bed. Someone was staggering back and forth in the bathroom (RT 9-10).

Phelps forced the door open. Mrs. Eden, who was staggering and moaning incoherently, had a deep cut on top of her head. There were red, bloodlike stains all over her person, in the hallway near the bathroom and on the floor of appellant's bedroom. There was broken glass covered with a bloodlike stain strewn about the hallway. Appellant appeared to be unconscious and was lying on the bed. There was no odor of alcohol on his person (RT 11-13, 17, 31, 54-56).

A chair was turned over in the bedroom. There was a bloodstained crumpled rug in the bathroom. (RT 22). On the floor of appellant's bedroom, Phelps recovered a razor blade (RT 14).

There were marks on appellant's chest and face resembling scratch marks. On his left wrist, there was a two-inch cut that looked as if it was caused by a knife.





On appellant's left forearm there was a circular mark that looked like a bite mark. Appellant had on trousers but no shirt, shoes or socks. There was a deep red damp stain on his trousers. En route to the police station, appellant who was handcuffed was asked what had happened. He did not reply. Appellant who by this time appeared to be conscious moved his head around and his eyes were open (RT 14, 18-21, 46).

Dr. Roscoe Webb examined appellant and Mrs. Eden on February 20, 1964 (RT 70-71, 80). Webb found no evidence demonstrating that appellant had been forced into a state of unconsciousness. The scratches on appellant's chest and face appeared to have been caused by fingernails. The superficial laceration on appellant's left wrist was caused by a razor blade (RT 75, 77-78). Webb asserted that the amount of blood on a blanket on appellant's bed could not have come from the wound on his arm (RT 27-28, 94).

Mrs. Eden was in a state of severe shock. A piece of scalp one inch square was missing from the top of her head. The jagged deep laceration on her forehead could have been caused by a bottle. It appears that Mrs. Eden had been struck twice. There was a large bruised area on her neck that could only have been produced by considerable pressure. She had a severely contused black



left eye and a lesser contusion of the right eye. Her cheek was superficially lacerated (RT 72-74, 83-84). Mrs. Eden was covered with blood and was bleeding from the scalp wound (RT 78). Dr. Webb concluded that Mrs. Eden, whose condition was critical, had less than a fifty per cent chance of survival (RT 75).

B. Defense testimony

Appellant testified on direct examination that on February 20, 1964, he worked until noon. After work, he went to Hollywood returning to the room he had rented from Mrs. Eden between 5:00 and 6:00 p.m. He did not see Mrs. Eden before he went into his room (RT 163-64, 168). After he took a shower, Mrs. Eden came to the door and he asked her for hot water for tea. While waiting for Mrs. Eden to return, appellant laid down on the bed. Appellant also testified that the first time he saw Mrs. Eden was before he took a shower.

Upon hearing a knock on the door, appellant opened it and observed a Mexican and a Negro who had a gun. The Negro said, "Be quiet and you won't get hurt." (RT 169, 199, 206). The Mexican put a knife to appellant's neck. After the Negro went towards the bathroom, appellant heard Mrs. Eden scream. Appellant hit the Mexican and ran into Mrs. Eden's room looking for a telephone which he did not find. He then ran into the



kitchen looking for a weapon (RT 200-01).

Both men came into the kitchen and took him back into his bedroom. The Negro went back to the bathroom. Appellant had a fight with the Mexican in which his wrist was cut. As the Negro came back to appellant's room, appellant threw two bottles at him (RT 202-03).

Appellant testified:

"They both came back in there and that is when they beat me, one of them, the Mexican guy. He was up by this time after we had wrestled and both of them came in and shoved me back over toward the bed and they hit me with something that was wrapped with something I don't know what it was. It looked like a piece of rubber. I couldn't identify it it happened so quick." (RT 204:1-7).

Appellant remembered waking either at the police station or at the hospital (RT 209). He denied striking or attempting to rape Mrs. Eden (RT 207). Appellant said that he had a conversation with Officer Tubbs in the jail on February 21, 1964, in which he denied having anything to do with beating Mrs. Eden (RT 212).

On cross-examination appellant testified that he was scratched on the chest and arm while "rassling"





with the Mexican (RT 214). Appellant was asked, "You knocked the arm holding the knife away from your neck?" He answered in the affirmative. Appellant stated that he then knocked the Mexican down with his hand (RT 219-21). He ran to Mrs. Eden's room and from there to the kitchen. After the Mexican and the Negro took appellant back to his room, the Negro hit him with a piece of rubber hose. Appellant lost consciousness after one blow (RT 222-23).

Appellant described the Negro as weighing 160 or 170 pounds, 5'7" to 6' in height, medium complexioned, short hair, wearing gray khakis and a blue shirt. He described the Mexican as 5' to 5'6" in height, black hair, 150 pounds, wearing a pair of pants and a shirt. In answer to a question asking the age of the men, appellant said that both were in the middle twenties (RT 227-29).

#### C. Rebuttal testimony

Jesse Tubbs, a police officer with the City of Los Angeles, testified that he had a conversation with appellant on February 22, 1964, at the main jail. Appellant told him that the first time he saw the two men was after he came in from outdoors and observed them assaulting Mrs. Eden as he walked down the hallway. Appellant stated that he did not know how he received the cut in his wrist. He also said that one of the men was Oriental (RT 251-52,



255-56).

John Nechak, a police officer with the City of Los Angeles, testified that he had a conversation with appellant on February 20, 1964, at the Hollywood Receiving Hospital (RT 278-79). He related what appellant said as follows:

"I worked for Doctor Robert Herman, 825 Cahuenga Boulevard, from 8:00 a.m. to 11:00 a.m. He has got a pet hospital there. I went home from there and stayed there at home until the police brought me here to the hospital. I only left the room where I live once from the time I came home from work until they brought me here. That was only for about five minutes when I went across the street to get a soda. After I got the soda I went back to the room and went to bed. That was about 7:00 p.m. While I was in bed I heard Miss Eden scream so I got up and started to go into her room through the hall. When I got to the hall I saw two men. One was a Negro and the other one was Oriental. The Negro was in his early twenties, about five feet ten inches, weighed about 150 to 165 pounds. He had black hair and was wearing a pullover blue sweater and



khaki pants. He had a silver revolver about medium size in his hand. The other guy was an Oriental about 25, four feet nine or ten inches, medium build, black hair. He was wearing a white sweater-shirt and khaki pants. They were both in the hall grabbing Miss Eden and when they saw me they chased me into my room. I grabbed a Dr. Pepper bottle and tried to get out the other door and the Oriental grabbed me and hit me over the head with the gun. That is all I remember. I don't know how my wrist got cut or how I got those scratches on my face and chest. I don't know about that mark on my arm either. I lived at that place about a week and never went into Mrs. Eden's room. I have never been in that room so you won't find no fingerprints of mine there. I heard Mrs. Eden in her room today but didn't see her until after she screamed.'" (RT 279-81).

The only contention raised by appellant on direct appeal of his conviction to the California Court of Appeal was that the trial court had erred in receiving into evidence statements made by him after his arrest since he had not been informed of his right to counsel or of his right to remain silent. (See "Exh. B"). The





facts, however, show that in the prosecution's case in chief no evidence of any statement by defendant was offered in evidence. During the direct examination of defendant, he said that while he was in jail he had a conversation with Officer Tubbs, wherein he told the officer what he (defendant) had said in court. A part of the defendant's testimony on direct examination was to the effect that while he was lying on the bed in his room, he heard a knock on the front door of the apartment, and when he opened the door, two men, a Negro and a Mexican came into the house - the Mexican, who had a knife, fought with defendant and cut him on the wrist; and the Negro, who had a gun went into the bathroom, then defendant heard Mrs. Eden scream (RT 169, 199, 200-229).

As a rebuttal witness, Officer Tubbs testified that in a conversation with defendant in the jail two days after his arrest, the defendant said that he first saw the two men assaulting Mrs. Eden when he (defendant) came into the apartment from outside, and that he did not know how he got cut on the wrist (RT 251-252, 255-256).

Officer Nechak, also was called as a rebuttal witness and testified to the effect that in a conversation with defendant at the hospital on the day of the arrest, the defendant said that while he was in bed he heard Mrs. Eden scream, then he went into the hall, where he saw two



men who were grabbing Mrs. Eden; but the men chased him into his room and one of them hit him on the head with a gun, but defendant did not know how he got cut on the wrist (RT 278-279).

It thus appears that the three different versions of the occurrences in the apartment (the version of the defendant as a witness, and his versions in the two conversations with the officers) were exculpatory - there was no admission or confession therein.

The record, therefore, discloses that the prosecution refrained from offering in evidence any statement of defendant in its case in chief. The defendant under direct examination, however, made exculpatory statements to the effect that while he was in the house after he had opened the front door in response to a knock thereon, two men entered the house and fought him and Mrs. Eden. In view of such testimony, the prosecution was justified in presenting, on rebuttal for impeachment purposes, evidence of exculpatory statements of defendant which were different from defendant's testimony on direct examination. Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960).

#### APPELLANT'S CONTENTIONS

1. Incriminating statements obtained from appellant while appellant was without counsel were introduced at his trial in violation of the rule in Escobedo v.



Illinois, 378 U.S. 478 (1964).

2. Evidence obtained by an illegal search and seizure was introduced against him at trial.

3. The state failed to provide compulsory process to compel the attendance of witnesses.

4. Appellant was denied effective aid of counsel on appeal.

5. Appellant was convicted of a crime not charged in the indictment.

SUMMARY OF RESPONDENT'S ARGUMENT

I. The statement made by appellant was properly admitted into evidence.

II. The gun was properly admitted into evidence without objection.

III. Appellant was not denied the use of compulsory process.

IV. Appellant has failed to exhaust available state remedies with respect to the issue of inadequate counsel on appeal.

V. Assault with a deadly weapon is a lesser included offense of assault with a deadly weapon with intent to commit murder.

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## ARGUMENT

### I

#### THE STATEMENTS MADE BY APPELLANT WERE PROPERLY ADMITTED INTO EVIDENCE

Appellant asserts that the statements obtained from him after his arrest were in violation of his right to counsel as enunciated in Escobedo v. Illinois, 378 U.S. 478 (1964). One statement was introduced, in part, on appellant's direct examination. The rest of the statements came in during the cross-examination of appellant and as part of the prosecution's case in rebuttal (RT 212, 235-242, 255-256, 278-281).

As Judge Zirpoli stated in his order denying the petition it is significant that the statements which were introduced were in and of themselves probably exculpatory rather than incriminating. Just as he did during the trial in his conversation with the police, appellant denied his guilt maintaining that he and Mrs. Eden were victimized by two assailants.

As pointed out by Judge Zirpoli these statements did not come in as part of the prosecution's case in chief. Rather, they came in only after appellant had testified on direct examination in a way somewhat different from the statements given to the police.

The policy that prevents as a prophylactic



measure use of evidence obtained in violation of law must in the instant case give way to the policy that demands the truth from a witness. Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960). Also see Walder v. United States, 347 U.S. 62 (1954). And Mallory v. United States, 354 U.S. 449, 453 (1957).

Judge Zirpoli's rationale that since petitioner's trial commenced on June 16, 1964, prior to the June 22, 1964 effective date for the prospective application of the Escobedo doctrine, appellant's contention in this regard must also fail (Johnson v. New Jersey, 384 U.S. 719 (1966)) would seem to be completely dispositive of this issue.

## II

### THE GUN WAS PROPERLY ADMITTED INTO EVIDENCE WITHOUT OBJECTION

Petitioner argued that a gun introduced in evidence at his trial was found in his room three days after his arrest after a search without a warrant and that this violated his constitutional rights to be free from unreasonable search and seizure. Judge Zirpoli held however that the trial transcript lodged with the court showed that petitioner's counsel deliberately waived any objection to the introduction of the gun. Judge Zirpoli recited the record of the trial at page 277 as follows:

"MR. GOLDMAN [the prosecutor]: May the



gun be received in evidence, your Honor, so I can leave it with the Clerk?

"THE COURT: Well, if there is no objection I suppose you can.

"MR. NUNGESSER [petitioner's counsel]: I have no objection.

"THE COURT: It will be received in evidence." (RT 277).

The court was satisfied that the above-quoted portion of the record established a deliberate bypass of the state's contemporaneous objection rule sufficient to satisfy the standard to be applied on review by federal habeas corpus and cited Henry v. Mississippi, 379 U.S. 443 (1965) and Nelson v. People of the State of California, 346 F.2d 73 (9th Cir. 1965).

### III

#### APPELLANT WAS NOT DENIED THE USE OF COMPULSORY PROCESS

Appellant next contended that he was denied the use of compulsory process to obtain the attendance of certain witnesses, when the district attorney allegedly dismissed these witnesses when he learned that their testimony would be in favor of appellant and that he further did not inform appellant's attorney of this until after trial. Judge Zirpoli held that the answer to this





contention was two-fold. First, the record indicated that there were no secrets with respect to the Castros, since an interpreter was sworn for the purpose of translating their testimony from Spanish, in the presence of appellant and another attorney from the same firm representing appellant at the pre-trial hearing. There is no requirement on the part of the prosecution to see that opposing counsel has properly prepared every facet of his case. Secondly, the record showed that at the arraignment for judgment, appellant's counsel moved for a new trial on all statutory grounds and indicated that he had been unable to locate the Castros. The court then gave appellant an opportunity for a continuance to try to locate the Castros, after which appellant consulted with his counsel and counsel informed the court that appellant would prefer to be sentenced at that time. The record thus amply showed that appellant and his counsel were given ample opportunity to obtain the presence of witness by compulsory process (RT 288:9-26; 289:1-26).

#### IV

#### APPELLANT HAS FAILED TO EXHAUST AVAILABLE STATE REMEDIES WITH RESPECT TO THE ISSUE OF INADEQUATE COUNSEL ON APPEAL

Appellant contends that his counsel on appeal was inadequate, since his attorney did not orally present appellant's argument to the Court of Appeal for its



consideration. Judge Zirpoli held that a review of the record, however, indicated that this contention has not been presented to the state courts and thus appellant had failed to exhaust available state remedies with respect to this question. 28 U.S.C. § 2254. It should also be noted that appellant was represented by counsel on appeal as evidenced by the record herein and that appellant's counsel on appeal did file a brief with the Court of Appeal raising those legal issues which in his opinion he assumed had merit. It is not necessary in California state courts for either the appellant or the appellee to present oral argument in addition to the briefs; and, therefore, it would seem that this contention is fully without merit even if petitioner had exhausted his available state remedies.

V

ASSAULT WITH A DEADLY WEAPON IS A LESSER  
INCLUDED OFFENSE OF ASSAULT WITH A DEADLY  
WEAPON WITH INTENT TO COMMIT MURDER

Appellant was charged with violations of Penal Code section 217, assault with a deadly weapon with intent to commit murder and California Penal Code section 220, assault with intent to commit rape. Appellant was convicted of a violation of California Penal Code section 245, assault with a deadly weapon (CT 1, 14).

Judge Zirpoli held, correctly so, that



California law allows conviction for a lesser included offense (Cal. Pen. Code § 1159) and that assault with a deadly weapon is clearly a lesser included offense of assault with a deadly weapon with intent to commit murder. People v. Greer, 30 Cal.2d 589, 596 (1947). Since no federal question is raised by such an interpretation of state law this is not a proper issue in this petition.

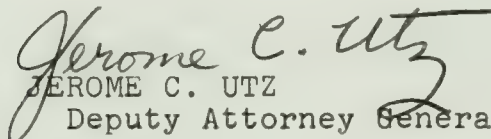
CONCLUSION

There being no merit in appellant's contentions, we respectfully request that the order denying the writ be affirmed.

Dated: May 25, 1967

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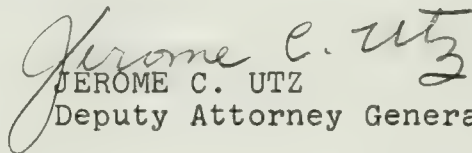




CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: May 25, 1967

  
JEROME C. UTZ  
Deputy Attorney General



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 21784

---

CHARLES JOSEPH BATTAGLIA, JR.,

Appellant,

- against -

UNITED STATES OF AMERICA,

Appellee.

---

Appeal From The United States District Court For

The District of Arizona

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BRIEF FOR APPELLANT BATTAGLIA

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

- - - - -x

CHARLES JOSEPH BATTAGLIA, JR.,

Appellant,

No. 21784

- against -

UNITED STATES OF AMERICA,

Appellee.

- - - - -x

Appeal from the United States District Court  
for the District of Arizona

BRIEF FOR APPELLANT BATTAGLIA

This is an appeal by the appellant Battaglia from a judgment convicting him of interfering with interstate commerce by threats or violence in violation of § 1951 of Title 18, United States Code (Hon. WILLIAM N. GOODWIN, sitting without a jury) and sentencing him on February 17, 1967, to ten years imprisonment and a committed fine of ten thousand dollars.

I.

JURISDICTION

The jurisdiction of the District Court was based upon § 1951 of Title 18 of the United States Code and the indictment filed herein.



§ 1951 of Title 18 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section---

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.



(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c.645, 62 Stat. 793.





The indictment charged Battaglia, along with one Spinelli and one Estes, with interfering with interstate commerce by threats or violence. The trial of Spinelli and Estes was severed and resulted in a judgment of acquittal (Docket Entries December 9, 1965, C.T. 99\*). Its formal recitations apart, the indictment alleged that Battaglia and Spinelli operated the Tucson Vending and Amusement Company and that on or about December 30, 1963, the defendants by use of force obtained "space" for a coin-operated pool table device and a share of the profits from that device by the use of threats against one Jerome C. Greenwell, the operator of the Diamond Pin Lanes Bowling Alley in Tucson. By way of its bill of particulars (C.T. 22) the government made it abundantly clear that its case turned upon a single coin-operated pool table about which we defer discussion until our treatment of the facts.

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\* "C.T." refers to Clerk's transcript; "R.T." refers to the reporter's stenographic transcript of the trial which is in two volumes and covers the proceedings of January 11th, 19th and 20th, and is numbered consecutively; "R.H." refers to the reporter's transcript of the hearing on the defendant's motion to suppress in connection with the electronic eavesdropping. These proceedings took place on January 16th and 18th.



STATEMENT OF THE CASE

A. Questions Involved

There are three basic questions which were presented for resolution to the District Court.

The first was: Was there an interference with interstate commerce? Only a single pool table was involved in the government's proof of its case and as we shall demonstrate in our treatment of facts, the pool table which was replaced by the pool table from the Tucson Vending and Amusement Company with which the appellant was associated had long since come to rest and lost its interstate character, nor was the replacement drawn from interstate commerce. If what transpired here burdened interstate commerce, then every commercial transaction, every purchase, every barter, no matter how local its source or consequence, has an interstate character.

The second question presented under the single substantive count of the indictment was whether Mr. and Mrs. Greenwell were in fact placed in fear. The ineluctable conclusion from the record is that they were not, and it is indicative of the strength of the government's case that Greenwell's own description under oath at the trial was:



"Q. And as you were walking around the building, were you in fear?

A. I have never feared Mr. Battaglia personally." (R.T. 123)

Mr. Greenwell's "fear" for his wife's safety was so great that at the time she was supposedly taking a circuitous route to and from the bowling alley she was permitted to go to the dog track and out dancing, unescorted by her husband. (R.T. 222-226)

The third question was whether the prosecution was tainted by the government's continuous and egregious "bugging" with trespass electronic devices of the defendant, his home, his place of business and places where he visited. This question breaks down into two subsidiary questions: First, was the electronic surveillance so great on the demonstrated record that the conviction should not be allowed to stand because the defendant's fundamental rights, including the right to counsel, were interfered with, and the conclusion is inescapable that the government's case was derived from the bugging; and second, whether the District Court so severely limited defense counsel's effort to develop the facts concerning the government's widespread and pervasive use of eavesdropping that the hearing





amounted to little more than the government's assertion that its case was untainted by the eavesdropping, and this is true despite the fact that some of the testimony at the hearing from police agents of the Federal government would do justice to a Baron Munchausen.

## B. The Proceedings in the District Court

### 1. The trial on the Merits

The government's case stood or fell on the testimony of Jerome Greenwell, the bowling alley operator, who was the supposed victim of the extortion, and to a much lesser extent on the testimony of his wife. Their testimony was sandwiched between witnesses whose evidence was either cumulative, directed toward matters not in genuine dispute, or irrelevant, and we accordingly summarize this secondary testimony but briefly.

The government's first two witnesses, REEVES (R.T. 37-43) and EDMISTON (R.T. 43-47), worked in a Tucson garage. Reeves testified that in 1963 he had seen Battaglia and the acquitted co-defendants Spinelli and Estes each driving cars which were serviced under the account of Tucson Vend-ing. Edmiston's testimony was to a like effect, except that he was permitted to testify over objection that he had seen Battaglia, Estes and Spinelli together in 1964, after the date



of the acts charged in the indictment. HUGH DOWNS (R.T. 47-55), a bowling alley and theatre manager, and DON THOMPSON (R.T. 55-60), a cocktail lounge operator, each testified that at about the period of the indictment Battaglia had spoken to them about vending machines and identified himself as being with Tucson Vending Company.

IDA CHAPMAN (R.T. 60-82), in June of 1963 had been manager of the Diamond Pin Lanes which at that time had been purchased by Mr. Greenwell. The lane used supplies principally from the Brunswick Company in Los Angeles (R.T. 61-62). About a month after some pinball and amusement machines from Tucson Vending were installed at the lane they were serviced by Spinelli; she had a conversation with the defendant Battaglia shortly thereafter about his bringing more machines and Battaglia said that he could get them the business of a bowling league and to that end a meeting with Greenwell and a representative of the league was set up at which the league signed up for the Diamond Pin Lanes (R.T. 65-68). In the late summer or early fall she was present at a conversation between the defendant Battaglia and Greenwell at which Battaglia asked to put in candy vending machines and subsequently the candy vending machines of Tucson Vending were installed (R.T. 68-70). In the latter part of 1963 a coin-operated pool table was installed



in the game room of the bowling alley after one had been placed in the bar, and subsequently the felt on the one in the game room was slashed (R.T. 77-78).

JEROME C. GREENWELL (R.T. 82-215), the government's principal witness, had in various times and in various places recounted to the authorities widely differing versions of his dealings with the defendant Battaglia and the extortion supposedly worked against him by Battaglia. We first set out the version which he told at trial and which dovetailed into the government's indictment and bill of particulars.

During the period from 1958 to 1966 Greenwell engaged in various self-employment ventures including fashion design woodcraft and had owned apartment buildings and in June of 1963 had purchased the Diamond Pin Lanes, a bowling alley which contained a cocktail lounge and a beauty parlor run under the name of Diamond Pin Enterprises by a Jack Gumbin and Hoyt Wells. He first met the defendant Battaglia in 1958 and was introduced to him by one Louis Serotta (R.T. 82-84). After he became the owner of Diamond Pin Lanes he talked with Battaglia, who pointed out that pinball machines could be installed in the concourse with fifty per cent of the profit going to Diamond Pin and fifty to Tucson Vending, and two pinball machines were installed and proved quite profitable and he contacted Battaglia in July





about installing more machines, and in the course of that conversation Battaglia expressed a desire to put in candy and cigarette vending machines. However the vending machines of the Canteen Corporation were already on the premises. (R.T. 84-88). Greenwell agreed that if Battaglia would use his influence to get a new bowling league into Diamond Pin Lanes and Battaglia would indemnify Diamond Pin against any loss from their contract with Canteen---Battaglia had offered to advance the monies due Canteen---he would permit Tucson Vending's candy and cigarette machines in. (R.T. 88-92). At this period Greenwell declined to sign a written contract with Tucson Vending until the situation with Canteen had been resolved. (R.T. 92-93)

Sometime thereafter Hoyt Wells, the manager of the sub-lease cocktail lounge, asked permission to install a coin-operated pool table, which was done in September of 1963. Gumbin, Wells' partner, spoke to Greenwell about how profitable the machine was and they agreed to put one like the one in the cocktail lounge in the bowling alley itself, and this was done early in January 1964. A few days thereafter Battaglia appeared at the bowling alley quite disturbed, and a "heated argument" (R.T. 97) ensued in which Battaglia asserted that any pool table in the bowling alley should have been installed by Tucson Vending according to their understanding. Battaglia



referred to what had happened to Serotta, whom Greenwell understood from newspaper reports had been found murdered in the trunk of his car, and made ominous allusions to Greenwell's attractive wife. Then, in Greenwell's own words:

"A. Well, we eventually simmered down, both of us, and then we got on a more intelligent conversation, I mean to where we weren't---temper wasn't all the basis.

Q. (By Mr. Corey) Now, did you do anything regarding the pool tables as a result of this conversation?

A. Well, we did get down to the point to where I agreed to---I think Mr. Battaglia then proposed contacting Mr. Gumbin and see what he wanted for his pool table because I subsequently agreed to see what I could do about getting the pool table. I think he offered, if I recall correctly, that he offered to buy the pool table from Mr. Gumbin and go along with us on the same basis." (R.T.99)

But Gumbin would not agree. Subsequently the bowling alley pool table felt was slashed and Greenwell called Tucson Vending and accused Spinelli of the slashing, and Battaglia



told him that a bowling ball dropped through the pool table top would be worse. After that conversation Greenwell contacted Gumbin, had the table removed and it was replaced with another table from Tucson Vending. As a result of what Mr. Battaglia said, Greenwell was in fear, or so he testified. (R.T. 92-102)

Thereafter a lawsuit ensued with Canteen and a Tucson Vending check for \$400 was paid over to Canteen. (R.T. 103-107) After the heated argument with Battaglia, Greenwell, because of Battaglia's having mentioned that he knew the route his wife took home, instructed her to take a better traveled road, without telling her the reason. After several weeks they quarreled about this and he told her of the conversation with Battaglia. A day or two later, in response to her telephone call, he met her and she was with a city detective who reviewed the situation with him, apparently from what his wife had already told the detective. (R.T. 102-108)

At the outset of his cross examination Greenwell made two extremely important concessions: first, that his memory was faulty, and second, that his prior statements were more accurate than his present recollection. Thus:

"A. No, I'll be truthful about this, right at this moment I don't recall the approximate time they spoke with me.





Q. Are you troubled with a faulty memory?

A. I guess I have a faulty memory.

Q. You do have a faulty memory?

A. Because, to be honest about this, I have tried to forget this, just forget this.

Q. So that would account for your having difficulty with your memory today?

A. That's right.

Q. Of course, when these events were fresh in your mind, by time, you could remember them a lot more clearly, couldn't you?

A. I'd say rather accurately at the time that all this thing happened, but right at the present time I couldn't recall.

Q. This is the year January, 1967--- month of January, year of 1967. If you had testified before a United States Grand Jury in January of 1965, two years ago, your recollection as to events of January 1964, would be much more accurate than your recollection now; isn't that so?

A. On minute details, yes.



Q. And also about the substance of the transaction in general, about the entire happening?

A. I have to admit that. I'm only human.

Q. We all are.

A. Yes." (R.T. 112-113)

Before turning to some of those earlier statements, Greenwell's testimony about his fear bears some examination. In the conversation with Battaglia after the installation of the pool table, Greenwell testified that they were both angry and that he gave as well as got, but it was only after the mention of Serotta and his wife that he became afraid. Thus:

"Q. Well, the two of you had been shouting back and forth to each other; am I right?

A. Yes.

Q. Shouting stops?

A. Shouting what?

Q. The shouting stops?

A. Yes, it subsided.

Q. And while you are still in the presence of the defendant Battaglia, you are not afraid; right? Yes or no.

A. Yes." (R.T. 120)



At this point the Trial Judge helpfully intervened to remind counsel that the local rule in Arizona required the cross-examiner to remain at the podium, and to construe the witness's answer as: "Yes, you were afraid." (R.T. 121) However, the witness's meaning is made clear very shortly thereafter:

"A. After we calmed down, I recall it very clearly, we got human toward one another and we talked like civil people to one another, and he said---he was trying to hold--- he told me that I had made a verbal agreement on the pool tables with him, and I said, 'I don't know where I made such a thing', but he kept insisting that he did have a permanent agreement---I mean did have a verbal agreement that he was to have the pool tables, and I gave in to him on insisting that the pool tables that he had---well, I gave in to his insistence that the pool table concession had been committed although I didn't think so.

Q. You didn't think so?

A. I went along with him.

Q. You went along with him?





A. Right.

Q. Because you were both being much more intelligent about the whole situation?

A. We went around and we discussed various things after that. We even walked around the building, as I recall.

Q. And as you were walking around the building, were you in fear?

A. I have never feared Mr. Battaglia personally.

Q. Thank you. Fine.

Now, this is the conversation where there was the threat about Serotta, right?

A. Yes.

Q. All right. This is the conversation where there was the threat about your wife?

A. That's what got me." (R.T. 122-123)

It is evident from this testimony that while Greenwell was not personally afraid, he feared for his wife, and it will be recalled that after this conversation the cocktail lounge owner, Gumbin, declined to sell out and that shortly thereafter the pool table was slashed, and that was when the fear jelled. (R.T. 188-190) Greenwell suspected Spinelli of



having slashed the pool table and threatened to poke him in the nose (R.T. 152) and was mad enough at him to hit him (R.T. 167). Further light on the authenticity of Greenwell's claim to be in fear of harm to Mrs. Greenwell must await the review of Mrs. Greenwell's testimony.

Greenwell's trial testimony is clear that his relationship with Battaglia was on a sound commercial basis until the controversy over the pool table installed in partnership with the cocktail lounge owners by Greenwell. Not only was Battaglia instrumental in bringing business to the bowling alley but, as Greenwell testified: "Tucson Vending did give or offer a better proposition than that Canteen had. The percentages I don't remember precisely." (R.T. 182). However, on prior occasions Greenwell had told the authorities a very, very different version of events. The threats to his wife, the extortion, had been responsible for the original introduction of Tucson Vending's machines because of threats to his wife made in the fall of 1963:

"Q. Well, do you recall this question and answer, page 102 of the January 18th transcript [referring to Grand Jury minutes]:

"Question: All right, that's what this statement is in terms of time.



'However, after receiving threats by Battaglia against his wife, Greenwell decided to remove Canteen's machines and install Tucson Vending.' Now is that an accurate statement, sir?"

"Answer: Well,---"

"Question: Please be as candid as you can with us."

"Answer: A remark was passed to that effect."

"Question: By whom?"

"Answer: Charlie Battaglia."

Do you recall being asked these questions and making those answers, Mr. Greenwell?

A. No, I don't, because---

Q. All right, sir, you don't recall. Now, do you recall in March of 1965--well, you tell us you don't recall appearing before the Grand Jury at that time, but in March of 1965, you appeared before the Grand Jury and Mr. Corey asked you about the time when threats were allegedly made against your wife. Do you recall him interrogating you, actually, about that?

A. No, I don't recall it at all, the interrogation.

Q. Do you recall being asked these questions and making these answers? And this is on page 47 of the March 5 minutes.





"Question: Directing your attention to a period of time when certain threats were made regarding your wife's life, do you recall that period of time?"

"Answer: It was during the fall of 1963."

"Question: Tell us about the threat."

"Answer: Well, it was during an argument---"

"Question: With whom?"

"Answer: With Charlie Battaglia."

"Question: In person or by telephone?"

"Answer: In person."

"Question: What happened?"

"Answer: Well, he reminded me of my wife and her appearance and he knew where she worked and approximate route she took home. He said, 'You would like for her to stay that way,' or something along that line."

"Question: Was this in connection with a contract agreement at that time?"

"Answer: Trying to get me to sign a contract."

Trying to get me to sign a contract. Do you recall being asked these questions and giving those answers?

A. I recall what you are talking about.

Q. No. Do you recall being asked these questions and giving those answers?



A. Not actually asking questions and---  
no, no, I don't recall.

Mr. Krieger: Your Honor, may I ask Mr. Corey for a concession that I have read accurately from the transcript?

The Court: Yes.

Mr. Corey: Up to the point where Mr. Krieger stopped, of course, and up to that point it was correct." (R.T. 162-165)

Indeed Greenwell had testified under oath before the Grand Jury, first that Battaglia had never mentioned Serotta and then that the threatening and ominous allusion to Serotta had taken place in the summer of 1963:

"Q. Page 119, January 18, 1965, Grand Jury testimony. Do you recall being asked these questions and giving these answers? You had been asked questions concerning the pool table.

"Question: Did he---" Obviously he was referring to Battaglia. "Question: Did he say anything about Serotta at that time?"



"Answer: No, he never mentioned Serotta at any time."

"Question: And again let me refresh your recollection, Mr. Greenwell.

'Battaglia reminded Greenwell at the time,' now this is at the time that he insists upon servicing the machines, 'that he could end up just like Serotta did.'"

"Answer: That's right, he did say that, I remember it now."

"Question: Now was that in the summer of 1963?"

"Answer: It was during all that upheaval at that time, the summer."

Do you recall being asked these questions and giving those answers?

A. I don't recall.

Mr. Krieger: Mr. Corey concedes?

Mr. Corey: The reading was accurate."

(R.T. 208-209).

Another headon collision of his trial testimony with is Grand Jury testimony occurred when Greenwell told the





Grand Jury under oath that the threat to have a bowling ball drop through the slate top of his pool table came by phone from a voice not Battaglia's:

"Q. Do you remember Mr. Corey asking you this question: 'The incident of the slashing influenced you to remove the table?' and your responding: 'That was the beginning of it, but then when I was advised how I would like to have---that was by telephone and it was not Battaglia, it was a voice unknown to me if I remember correctly, but a phone call was received, how would I like to have a pool ball---I mean a bowling ball through the slate. That is a very costly item and I knew there would be no way in the world to police the people coming in there to find out if they were going to put a bowling ball through the slate.'

Do you recall that question and answer before the Grand Jury? Please, yes or no, sir, or "I don't recall," one or the other.

A. I don't recall.



Q. You don't recall that?

A. Not the way you put it." (R.T. 146-147)

Before leaving Mr. Greenwell, one last bit of his testimony deserves mention. On any one of Mr. Greenwell's versions of the events, by March of 1964 he had received the threats which, whether they caused him to fear for himself or his wife, caused the basis of the government's claim that there was an extortion. At that very time, or at least so Mr. Greenwell told the FBI and the Grand Jury, Greenwell became dissatisfied with the servicing of Tucson Vending and in his own words, "did a little threatening", (R.T. 199) about having Tucson's machines removed or put in storage. (R.T. 194-201)

GARNET GREENWELL (R.T. 215-229), the wife since 1963 of Jerome Greenwell, testified that in June of 1963 on through January of 1964, she worked with her husband at the Diamond Pin bowling alley after finishing her regular job, and after January ran the restaurant, usually staying from late in the afternoon until nine or ten at night. Her husband usually remained at home doing drafting in connection with his other ventures. She described her customary road home which took her through a poorly lit country road. In



the latter part of January, at her husband's insistence, she changed her route of travel home, and was told to call him when she left the bowling alley. If she did not arrive home promptly, he became upset. After some quarrels with her husband he finally related to her that Battaglia had made threats to him. When her husband told her of these threats he appeared worried. (R.T. 215-220)

On cross examination she testified that she went to the dog track, and sometimes without her husband. She testified that she likes to go dancing, and that her husband does not dance. At this point the Court, without objection from the government, intervened to close off this area of questioning, and advised counsel that it did not make any difference to the Court as the trier of fact whether or not Mrs. Greenwell was unfaithful. This, of course, missed the entire point of the line of counsel's questioning even though, as counsel pointed out, it had two obvious direct probative tendencies. The first was to show that Mr. Greenwell had other reasons to insist upon knowing when his wife left the bowling alley, and the second was to show that at the time he claimed to be taking these extraordinary precautions for her safety he was in fact permitting her to go to night clubs and race





tracks by herself, which certainly would cast some doubt on his claimed concern for her safety. (R.T. 221-226) During this period, even on the occasions when the two Greenwells went out to dinner together, they each drove their own cars. (R.T. 228)

The government next called a group of witnesses whose testimony was either cumulative, irrelevant or not directed to contested issues. DON BIRSCHBACH (R.T. 229-239) testified on direct examination that he had been the manager of Diamond Pin Lanes from February to May of 1964 and during that time he had encountered Battaglia when they were both bowling at a different bowling alley and Battaglia had told him that he was treating Spinelli roughly and that Bierschbach should keep his nose out of the quarrel between Battaglia and Greenwell or Battaglia would beat him. On cross examination Bierschbach conceded that he had had a pretty vehement argument with Spinelli prior to the incident as to which he testified and that he had told the Grand Jury that Battaglia had told him that the argument between Greenwell and Battaglia was personal.

THOMAS MCCORMICK (R.T. 239-253) and NATHANIEL RAILEY (R.T. 253-260), a bowling lane maintenance man and porter



respectively at Diamond Pin Lanes, gave testimony the general effect of which was to show opportunity on the part of Spinelli and Estes who were in the bowling alley after it was closed on the night when the felt on the pool table was slashed, though McCormick conceded that he did not know whether all the doors to the bowling alley were locked that night.

HOYT WELLS (R.T. 260-267), the manager of the cocktail lounge in the bowling alley, testified to seeing the pool table in good condition at about eleven o'clock at night and observing the table slashed at about two the following morning. JACK GUMBIN (R.T. 267-283), testified generally corroboratively of Greenwell's joint purchase with him of the pool table for the bowling alley concourse, it subsequently being slashed, repaired, removed and replaced with a table from Tucson Vending. On cross examination he conceded that he was a stockholder and employee of the competitor Canteen Corporation.

The defense offered no evidence except the brief testimony of Agent EARL FAUVER (R.T. 285-295) whose testimony bore on the authenticity of some of the interview statements produced under §3500 of Title 18 with which the government witness Gumbin had been taxed in cross examination.



## 2. The Hearing on the Government's Use of Trespass Electronic "Bugging" Devices

At the outset we ask the government to produce in sufficient quantity so that each member of this Court may have copy, Government's Exhibit 18, the so-called logs of the electronic eavesdropping in this case, and while we refrain from making a pamphleteering attack on the use of eavesdropping devices in general, we respectfully submit that the force and meaning of our contentions cannot be judged apart from the logs taken in their entirety. (They were marked in evidence R.H. 123).

On January 11th before the trial opened, Mr. J. F. Cunningham, a Department of Justice attorney, disclosed to the Court and counsel the existence of trespass electronic surveillance in connection with the case. (R.T. 6-28) Accordingly the matter was set over until January 16th, at which time a hearing was set on a motion made by the defendant (R.T. 13) to dismiss the indictment and to suppress any direct or indirect fruits of any illegal bugging and alleging violations of the defendant's Third, Fourth, Fifth, Sixth and Ninth amendment rights. At the opening of the hearing, Mr. Cunningham, who handled this aspect of the case, after reviewing the





statement of the Solicitor General and the policy of the Department of Justice, told the Court:

"Acting upon that, Your Honor, the Criminal Division was first notified that there had been microphone surveillances in this case on Friday a week ago, January 6th. The Organized Crime Section on Monday obtained the logs that had been made in connection with the surveillances and I reviewed those on the following day on Tuesday, January 10th. Immediately thereafter I left for Tucson in order to bring that to the attention of the Court and the defense counsel, which I did on the morning of January 11th. At that time I made those facts known to the Court and to the defense counsel, and the defense then filed an oral motion to suppress, in connection with which the Court ordered the Government to turn over to the defendant the logs of the conversations that had been written in the case, and which the Government then did. At that time we conceded and we do concede that the microphones were installed by trespass at



the following locations: First, at the residence of Joseph Harley Hootner, Apartment E, 930 North 7th Avenue, Tucson, Arizona, and they were operating from the period January 23, 1961, to March 13, 1961. Such microphones were also installed at the Travelodge Motel, 7370 Sunset Boulevard, Los Angeles, California, and were operated on the two day period January 12 and 13 of 1962. Such microphones were also installed at the residence of the defendant Battaglia at 1938 West Lester Street, Tucson, Arizona, and operated for the period from May 25, 1962 to October 1, 1962, and from May 9, 1963 to August 12, 1963. They were also installed at the Tucson Vending & Amusement Company, 6541 East Tanque Verde Road, Tucson, Arizona, and operated for the period June 18, 1964, until August 7, 1964. Likewise installed at the Tucson Vending & Amusement Company at 2717 East Grant Street, Tucson, Arizona, and operated during the period from September 23, 1964 to November 20, 1964. In connection with these installations, Your Honor, we are informed they were installed on the general authority of the Attorney General, and that



they were operated in connection with the FBI's continuing inquiry into organized crime and under the belief that organized crime was being conducted on those premises." (R.H. 20-22)

One of the recurrent issues which we will treat intensively in the body of our argument was the scope of the hearing. In their memorandum in opposition to the defendant's motion to suppress, the government made it very clear that it would oppose any effort by defense counsel to discover whether or not there was other illegal bugging which the government had not revealed, and took the position that the defendant was bound and limited to explore only what the government had revealed. (C.T. 75) The defendant's position was that given the wide range of electronic bugging already admitted, the defendant was reasonably entitled to explore the existence of other undisclosed bugs. It should be made perfectly plain that no aspersion is cast upon the integrity either of Mr. Cunningham or Mr. Corey who represented the Department of Justice at the trial. They undoubtedly told the Court what they knew. Not so the police agents of the Federal government. As we shall shortly demonstrate, at least one of them testified under oath in a way which would affront the credibility of any grownup and which we believe will shock this Court.





We turn now to the witnesses called at the hearing.

Agent EARL FAUVER (R.H. 24-73) of the FBI, assigned to the Phoenix office, examined on behalf of the government, testified that he conducted the investigation of the case on trial from April 1964 to January 1965 as a result of a report by Mr. Greenwell to the Tucson police department. To his knowledge he never received any information connected with any microphone or eavesdropping and prior to and during the course of his investigation he never learned of microphone surveillances in connection with the defendant Battaglia; no other agent of the FBI ever suggested any other person for him to interview or leads to follow in connection with the Battaglia investigation. The Tucson police report led him to Greenwell and Greenwell led him to Ida Chapman and Don Bierschbach. Chapman led him to McCormick and Gumbin and Mr. Corey suggested Railey and Hoyt Wells as well as James Reeves, and Thompson was interviewed as the result of an independent investigation of a separate crime. (R.H. 24-33)

On cross examination Fauver testified that Mr. Johnson was the resident agent operating the Tucson office of the FBI who had received the complaint from the Tucson police department and who drew the original report about the incident



which was forwarded to Phoenix, where the case, when it was officially opened, was assigned to him. Though he knew Battaglia's name from conversations with other agents he did nothing to familiarize himself with the files on Battaglia; he discussed the progress of the case with Agent Johnson. Mr. Cornet of the Tucson office of the FBI also knew that he was conducting an investigation of Battaglia. (R.H. 33-42) The case he was working was numbered 92-482; 92 refers to a Hobbs Act investigation and 482 was the number of the particular case. (R.H. 61) He looked at other cases with reference to Battaglia and Tucson Vending (R.H. 66).

The next witness was KERMIT JOHNSON (R.H. 73-219), the resident FBI agent in Tucson. Johnson's testimony is of critical importance to the issue of the bugging in two respects. First, in certain essential and material regard, Johnson swore to a story so inherently implausible and incredible that it casts a shadow of fabrication across the testimony of the government agents who testified at the hearing. Second, defense counsel was shut off from exploring perfectly proper and valid lines of inquiry with Johnson. The government's position as stated by Mr. Cunningham was that the logs turned over to defense counsel were the only



original records ever made of the bugged conversations. Mr. Cunningham told the Court: "There are no tapes". (R.T. 21). Again in its written reply to the defendant's motion to suppress, the government flatly stated: "No tape recording or other original record of these words were made" [referring to words overheard by trespass microphone surveillance].(C.T.70)

Agent Johnson testified:

"A. Yes, sir.

Q. There was no recording equipment?

A. No, we did not record it.

Q. At that time?

A. No.

Q. Did there come a time when you did record?

A. No, we have no tapes.

Q. You did not record it?

A. No, I don't recall having recorded any.

Q. Do you have tape equipment for this purpose?

A. I don't have any, no."

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"Q. (By Mr. Krieger) There is a reference in defendant's Exhibit D in your handwriting?

A. Yes.





Q. Is it not?

A. Yes.

Q. New tape No. 4?

A. Yes.

Q. Am I right?

A. Yes.

Q. Was there any tape recording of that conversation?

A. No, for the reason that---I can explain as to the tape.

The Court: Go ahead and explain.

A. As to the tapes. We had tape recordings, tape making equipment at the time. However, it did not function, it did not record properly.

Q. All right. How many times did you make tape recorded transcriptions of conversations intercepted in Battaglia's home---

A. I didn't---

Q. One moment, let me finish the question. How many times did you make tape recorded or attempt to make tape recorded transcriptions of conversations in Battaglia's home which did not come out?



A. I don't remember.

Q. How many times did you try?

A. I couldn't tell you exactly the number of times.

Q. Where are old tapes 1, 2, and 3?

A. Probably didn't work, to the best of my knowledge.

Q. You don't know?

A. No. There were no tapes.

Q. There were what?

A. There were no tapes that were working you could record the conversation.

Q. Where is that equipment?

A. I don't know.

Q. What kind of equipment was it?

A. You mean---

Q. What was the tape equipment?

A. Well, I don't know what the name of it was.

Mr. Cunningham: Your Honor, what difference does it make? They made no tapes. What difference does it make?

The Court: Let him go ahead.

Q. (By Mr. Krieger) What kind of equipment was it?



A. I don't know.

Q. Who checked it out?

A. Checked it out as to its working?

Q. Yes.

A. When I was handling it, I was checking it and it didn't work.

Q. It didn't work?

A. No.

Q. So you kept changing tapes?

A. Right.

Q. And you wrote down on your log, "A new tape."?

A. Right." (R.H. 76, 81-84)

Focusing now on the areas of inquiry which the Court foreclosed we find that the Court would not permit answers to the questions as to who authorized the installation of one of the microphones, even though counsel specifically pointed out that if such information were available it could be verified and the authorizing person could be subpoenaed and asked whether other trespassing microphones were installed which had not been revealed by the government. (R.H. 76-79) This line of inquiry was again cut off by the Court and again counsel persisted:





"Mr. Krieger: Your Honor, you are cutting me off from perhaps other eavesdropping.

The Court: Who cares about other eavesdropping unless it pertains to Battaglia?

Mr. Krieger: We don't know unless we know if it was conducted. I don't know what was in the other eavesdropping, if it occurred. If someone---

The Court: Just a minute, counsel. What you want to know is who authorized this particular eavesdropping and I say what materiality that has, I say go on to something else. There is no materiality who authorized this. . . " (R.H. 91-92)

The matter was pursued further and again after lengthy colloquy the Court foreclosed the inquiry (R.H. 93-99), even though it did permit Johnson to testify that he was not the one who authorized the microphone installations (R.H.125). Again the Court foreclosed an inquiry into the nature of the physical installation (R.H. 139-141). In still another area when defense counsel attempted to lay a foundation by showing that a conversation between the defendant and his then attorney who had been retained in connection with the matter which was to become the criminal case herein, the Court narrowly construing the scope of the hearing, brushed the inquiry aside (R.H.



143, 150, 165). Once more when counsel tried to probe the location of the surveilling microphones the Court found it of no materiality (R.H. 169). Ultimately counsel was able to develop the overhearing of conversations in 1964 between the defendant and his attorney, Soble (R.H. 190-193). Johnson also testified that an Agent Flynn participated in the electronic surveillance of Battaglia in his home (R.H. 170-172). No electronic surveillance was placed in the Tucson Vending office on Speedway Boulevard. (R.H. 173) After establishing that Johnson's initial report was filed under the same file number as the electronic logs---92-152---counsel moved for the production of the memorandum made by Johnson, in a perfectly reasonable effort to see whether there was spillover from the electronic surveillance into the government's case, specifically suggesting that it might show efforts to lead or correct the witness Greenwell's memory on the basis of its electronic surveillances (R.H. 206-216).

Counsel was thus effectively foreclosed from testing or pursuing the government's use of its admitted trespass electronic surveillances or the existence of undisclosed surveillances.

JIMMY G. ADCOCK (R.H. 219-227), a former sergeant with the Tucson police force serving in the intelligence unit,



was called and defense counsel sought to examine and to prove by his testimony that Agent Flynn, since deceased, of the Tucson office of the FBI, had told him while they were both surveilling Battaglia that the FBI had installed electronic bugging devices at the 3533 East Speedway office of the Tucson Vending and Amusement Company, a location not covered by the logs in the government's possession. The Court, as we shall argue at length below, gravely erred in refusing to admit this competent and material testimony.

JOSEPH SOBLE (R.H. 227-236), who had served as attorney for Tucson Vending and for the defendant Battaglia personally, testified that sometime after March 1964 he had conversed with Battaglia who had told him that there had been an argument with Greenwell, the owner of Diamond Pin Lanes, which might be misconstrued and twisted by someone, and that he had had various conversations with Battaglia about the problems of Tucson Vending and the situation with Greenwell at Battaglia's home and the office located on Speedway Boulevard and the office located on Tanque Verde.

JAMES W. CORNET (R.H. 236-250), an investigative clerk in the Tucson office of the FBI, testified that he listened by means of eavesdropping devices to conversations





that Battaglia had. He was originally instructed by Mr. Flynn to listen to the conversations coming from Battaglia's home and from other locations. He testified that the recording equipment did not work as far back as when he first came to the office in 1961 and no one ever bothered to fix it. (R.H.242)

One further matter: an AGENT SNELL had been referred to during the course of Agent Johnson's testimony and again by Mr. Cornet as having installed the microphones in Tucson. Defense counsel desired his production and indicated that he would examine him about the physical installations he made and explore who gave the orders and develop the full extent of eavesdropping. The Court ruled this testimony immaterial, (R.H. 175-187), and after Mr. Cornet's testimony the Court reiterated its ruling and made it abundantly clear that it would not have heard Snell's testimony. (R.H. 251-252)

### III. SPECIFICATIONS OF ERROR

I. It was error for the District Court to convict the defendant (R.T. 314) in that there was insufficient evidence to support a finding of:

(a) an interference with interstate commerce

[treated with detailed quotations and citations to the record in our Point I-A, page 43-51 , infra];



(b) an extortion [treated with detailed quotations and citations to the record in our Point I-B, page 52-55, infra ].

II. The District Court erroneously restricted the cross examination of the key government witness, Mrs. Greenwell [treated with detailed citations to the record, including the grounds advanced for the questions and the basis of the Court's ruling, in our Point II, page 56-59 , infra].

III. In regard to the government's use of trespass electronic eavesdropping surveillance, the District Court erred by:

(a) Failing to suppress the government's evidence offered at trial [treated with detailed references to the record in our Point III-A, page 61-65 , infra];

(b) Failing to dismiss the indictment because of the eavesdrop intrusion into conversations between Battaglia and his attorney, Soble, in violation of the Sixth Amendment [treated with detailed references to the record in our Point III-B, page 65-68 , infra];

(c) Failing to dismiss the indictment and bar the prosecution because of the pervasive invasion of the defendant's rights by the government's use of electronic



surveillance [treated with detailed references to the record in our Point III-C, page 69-71 , infra];

(d) Improperly restricting the scope of the defendant's inquiry at the hearing into the government's use of electronic surveillance [treated with detailed references to the record in **our** Point III-D, page 71-77 , infra].





POINT I

THE EVIDENCE AGAINST BATTAGLIA IS INSUFFICIENT TO SUSTAIN THE CONVICTION

The leading case of Stirone v. United States, 361

U.S. 212 (1960) sets out that:

" \* \* \* there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion." (Id. at 257)

We respectfully submit that even viewing the evidence in a light favorable to the government, there was an insufficiency of proof as to each element.

A. The Failure of Proof as to Interstate Commerce

The Trial Court, when it found the defendant guilty, leaned heavily on the fact that the pool table question as established by the stipulation (C.T. 83-89), had been ordered from a local representative who in turn had ordered it from out of the state and then delivered it to the Diamond Pin bowling alley. (R.T. 309) Though not mentioned specifically by the Trial Court, the same stipulation also establishes that the replacement pool table likewise came from an out-of-state to a Phoenix company and from a Phoenix company to



Tucson Vending. It was here that the Court found the interstate element. Indeed the proprietor, Mr. Greenwell, testified that Diamond Pin Lanes was not located on a highway but on a side street and that his business was "Tucsonian".

(R.T. 157) The question thus becomes, assuming without conceding that there was an extortion, whether the mere fact that the victim of the extortion had made some purchases from sources which relied on interstate commerce was enough to bring it within the act. The act however, is couched in terms of an effect on interstate commerce, and the effect must occur. As this Court said in Carbo v. United States, 314 F.2d 718 (9th Cir. 1963) at 732: " \* \* \* any area is included so long as the necessary effect upon interstate commerce results."

(Emphasis supplied.) This Court also noted in Carbo, supra, at 732, that the act is primarily directed against labor racketeering. Of course it is not limited to labor racketeering, but Carbo is a good illustration of the kind of burden on interstate commerce which needs to be found. In Carbo the Court specifically alluded to the fact that the boxing matches were televised and broadcast into other states. (Id. at 747) Not only did the Carbo case emerge, as the Court pointed out, from a background of Federal anti-trust litigation, but in



connection with one set of promotions both the ABC and NBC networks were involved, and sums of 180 thousand dollars a week were concerned. (Id. 724-725) Though the District Court referred to Carbo (R.T. 308) when it found the defendant guilty, we think Carbo was hardly controlling in the government's favor. Taking a view of the evidence most favorable to the government, one pool table was removed from Diamond Pin Lanes, a local bowling alley, and replaced by another. It could hardly seriously be argued that a robbery in which a gold inlay is knocked out violates the Hobbs Act, even though the gold came from interstate, or indeed foreign, commerce, to the dentist's office, nor, we submit, would the fact that the dentist replaced the inlay with new gold which had an interstate or foreign source. Examination of the Stirone case, both in the Supreme Court and the Circuit Court, is illuminating. The victim in Stirone was a concrete supplier; he drew his sand from interstate shipments and at the time of the case his cement was being used to construct a steel mill which ultimately was to ship steel in interstate commerce. We note of course immediately one striking ground of difference: in Stirone there was a continuous flow of sand in from interstate commerce and presumably a continuous





flow of steel out into the stream of interstate commerce.

The indictment rested only upon the flow of mixing materials to the victim's concrete plant. The Trial Court had submitted both the inflowing materials and the ultimately outflowing steel from the eventually-to-be-completed plant as grounds for the jury's consideration. In the Circuit Court the variance was treated as harmless, but Judge Hastie, later joined on petition for rehearing by Chief Judge Biggs, wrote:

"The extortionate threat was made against a local supplier of mixed concrete. It is entirely speculative whether or not preventing this single materialman from furnishing mixed concrete on the construction job he was serving would have affected even future interstate commerce. Was concrete in abundant or short supply? Were there other materialmen ready and anxious to supply without delay the concrete needed for the job? The record tells us nothing. But without some proof that the loss of this supplier would in fact have some delaying effect on the eventual productivity of the mill, any suggested ultimate effect even on interstate commerce several steps removed is speculative to an extreme degree.



It is true that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." See *United States v. Women's Sportswear Mfgs. Ass'n*, 1949, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805. But this figure of speech carries with it the idea that the "squeeze" must be real and the "pinch" uncomfortably perceptible.

On the present record no more can be said than that what was done to an entirely local business might conceivably have future impact on commerce. Most certainly not even a likelihood of actual impact upon interstate commerce can properly be said to have been proved beyond reasonable doubt. Yet that at least was the burden the government undertook to bear in this criminal case.

Finally, it should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary



and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction. See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 1948, 13 Law and Contemporary Problems, 64, 70. We should insist that federal jurisdiction be clear before imposing federal sanctions in an area of primarily local concern." (United States v. Stirone, 262 F.2d 571 [3rd Cir., 1958] at 579.)

In the Supreme Court, the Stirone case, supra, was explicitly decided on the variance point. The Court found the theory of interference with the outflow of steel from the mill which was to be constructed a "difficult question", and implicitly, we think, lent great weight to the view of





Judge Hastie quoted above. The Court speaks of the "blockage" (361 U.S. 212, 216) of commerce, and of commerce being burdened (361 U.S. 212, 218).

The critical point, of course, is that not every extortion directed against a local business which has some interstate character falls within the ambit of the Hobbs Act. It is only when, in Judge Hastie's phrase, there is a real squeeze and an uncomfortably perceptible pinch affecting interstate commerce that Federal jurisdiction comes into play. This point is vividly illustrated in United States v. Critchley, 353 F.2d 358 (3rd Cir., 1965). In that case a union officer extorted four thousand dollars from a roofing contractors organization. The roofing contractors were using in New Jersey slag roof from Pennsylvania. The nature of the extortion was that the defendant complained to a public housing authority that below-specification materials were being used in the construction undertaken. Here again we note that the case deals with a continuing, ongoing, repetitive supply of materials. In any event, the Court found that the threat to make the complaint or even the making of the complaint, though it obviously would have vexed and harassed the victims, would not have



constituted an interference with interstate commerce, and directed the entry of a judgment of acquittal.

Even though at one time Greenwell had told a story about being obliged to take on a line of vending machines (R.T. 162-165), a situation which might have presented a very different question, he abandoned that story and the indictment makes plain that the government's case rests upon "a coin operated pool table device" (C.T. 5) and the government's bill of particulars confirms that it was solely concerned with the replacement of a single coin operated pool table device (C.T.22). Any attempt in this Court by the government to justify or sustain the conviction on any basis except the single coin operated pool table would, of course, run afoul of the variance holding of Stirone v. United States, 361 U.S. 212 (1960). It would be disingenuous not to recognize what this Court knows from the explicit testimony of Agent Johnson (R.H. 216-217) and the general context of the hearing on the use of electronic surveillance against the defendant: Battaglia had been a target of the FBI since 1961 and his name appeared on some sort of a list of persons thought by the Federal police to bear an evil reputation. What has happened is that the government in its zeal to get Battaglia is asking this Court to



expand and distort the Hobbs Act. We discuss below the various theories propounded and abandoned by Greenwell as to what happened factually. At this point we focus on the issue as to interstate commerce. The sound principle of federalism enunciated by Judge ~~Hastie~~ in the Circuit Court Stirone case, supra, is more important to the impartial administration of justice than the conviction of Battaglia because he is on some sort of list or other. If the removal and replacement of a single pool table are enough to invoke the Hobbs Act, then it is hard to see in reason why the robbery of a wrist watch, surely an item of interstate commerce, is not also sufficient to invoke Federal jurisdiction under the Hobbs Act. Such a result is manifestly unreasonable.

We respectfully submit that however commendable the government's zeal may be in this case, on the one-pool-table indictment they drew and the proof they adduced in support of it, they utterly failed to meet the minimum standards of an effect on interstate commerce. We respectfully submit that on this ground alone, Federal jurisdiction having been shown to be lacking, this Court ought to reverse with a direction to the District Court to enter a judgment of acquittal.





## B. The Failure of Proof as to Extortion

The decision of this Court in Carbo v. United States, 314 F.2d 718 (9th Cir., 1963), sets out at 740 the rule that to prove a substantive act of extortion it is essential to show the generation of fear in the victim. Unlike an attempted extortion, where an endeavor to instill fear is sufficient, or a conspiracy, where a plan to instill fear is sufficient, the present case involves a conviction for the substantive crime of extortion. We recognize that at this juncture the government is entitled to have the evidence viewed in a light favorable to it, but that does not mean in a light which defies reason. It must be possible on the record for reasonable men to conclude that the defendant's guilt was proved beyond a reasonable doubt. (Curley v. United States, 160 F.2d 229 cert. den. 331 U.S. 837 [1947]. Compare: United States v. Valenti, 134 F.2d 362 cert. den. 319 U.S. 761 [1943].) Though the Trial Court has, of course, wide power to resolve contested issues of fact, we think the appellate scope of review is broader where trial was before the Court than where trial was before a jury which for historical reasons appellate courts have been more reluctant to review. (Cf. United States v. Maybury, 274 F.2d 899 [2nd Cir. 1960].) The Trial Court's finding here



was based on such extraordinary reasoning that we respectfully submit that this Court should reverse it. In finding the defendant guilty the Trial Court noted many instances (R.T. 312) of inconsistent statements to the Grand Jury, the FBI, and the Tucson police on the part of Greenwell. The Court then went on to suggest that when something unpleasant happens people try to forget it, but "gradually the time passes and the strain is relieved". (R.T. 313) On this basis, apparently, the Court concluded that Greenwell's trial testimony was to be believed in preference to his earlier statements and earlier sworn Grand Jury testimony. Such certainly is not the general rule. United States v. DeSisto, 329 F.2d 929 (2d Cir.) cert. den., 377 U.S. 979 (1964), and authorities there cited. See also: United States v. Borelli, 336 F.2d 376 (2d Cir. 1964). However, there is no need in this case to resort to general propositions or construct a speculative psychology of memory. We have the flat testimony of Greenwell himself (R.T. 123) that his present memory was poor and his earlier statements and testimony more accurate, quoted supra, at pages 12-14 in our Statement of the Case. We have confined ourselves in our Statement of the Case to the major inconsistencies in Greenwell's testimony and inconsistencies with prior sworn testimony primarily before the Grand Jury. Of course a witness may be picked at



with trifling variations of description or time of day and the like, but the inconsistencies here represent wholly contradictory versions of the events. Greenwell's trial testimony was that the threats and extortion concerned only the single pool table which was the subject matter of the indictment and which occurred around December 1963 or early January 1964. His earlier statements reflected that the threats and fear for his wife induced him to enter into the original arrangements for the placement of Tucson Vending's machines. (Statement of the Case, supra, at 17-20 ; R.T. 162-165). Such wholly diverging accounts, we submit, reduce the witness's credibility below the minimum required for a criminal conviction.

Inconsistencies apart, Greenwell's testimony about his state of fear also leaves a gaping hole in the prosecution's case. Greenwell testified that he was never afraid of Battaglia (Statement of the Case, supra, at 16 ; R.T. 123); that he threatened to punch the presumed pool table slasher, Spinelli, in the nose (Statement of the Case, supra, at 17 ; R.T. 152, 167); and that his only fear was for his wife's safety (Statement of the Case, supra, at 16 ; R.T. 122-123). But the hollowness of this claim is demonstrated





in two ways: first, in March of 1964 when he was supposedly in terrorem after the threat to his wife, after she had changed her route of travel, he "did a little threatening" of his own and contemplated getting into a controversy about having Tucson Vending's machines summarily removed (R.T.199; 194-201); second, he never even troubled to pick his wife up when she worked late at the bowling alley during the period of supposed maximum danger and when they dined out together each drove home in separate cars. (R.T. 221-226; 228) We complain in Point II, infra, that we were unduly restricted in cross examination of Mrs. Greenwell, but we submit that even that limited amount of examination which was permitted by the Trial Court was heavily suggestive of the falsity of her husband's claim of a fear for her safety. While we have focused on certain key features which demonstrate Greenwell's unreliability as a witness and the woeful deficiency of any proof of fear, we close by pointing out that Greenwell testified that aside from the pool table incident, his commercial relationship with Tucson Vending had been a profitable and beneficial one (R.T. 84-88; 182). There was ample commercial motive for Greenwell to have acquiesced in the replacement of the pool table.



POINT II

THE TRIAL COURT PREJUDICIALLY LIMITED  
THE CROSS EXAMINATION OF ONE OF THE  
GOVERNMENT'S KEY WITNESSES, MRS. GREENWELL

It will be recalled that Mr. Greenwell, the proprietor of the Diamond Pin Lanes, maintained that his fear was not for himself, but for the safety of his wife, and that he asked her to take a better-lit route home when she worked at the bowling alley. She testified on direct examination of being told of the threats only after she had taken the different route home at her husband's insistence for some period of time. Her husband usually worked at home and when she finished her duties as manager of the restaurant she drove home alone. Early in 1964 her husband insisted that she take a different route home, call when she left the bowling alley, and he appeared very upset when she didn't arrive home within the allocated time after the call. After a period of time she quarreled with her husband and he told her of the threats Battaglia had supposedly made against her safety. At that time her husband appeared very concerned and worried. (R.T. 216-219) On cross examination counsel started by developing the fact that she went to the dog track without her husband



and that she liked to go out dancing even though her husband did not dance. When counsel put a question to her about finding other dancing partners, the Trial Court, without any objection having been raised by the government, cut in to inquire what the materiality of the question was. Counsel indicated that at least one ground of materiality was to show that she might have given her husband cause for jealousy which might account for his upset appearance and his apprehensiveness about her prompt return home (R.T. 223). Another obvious ground argued by defense counsel (R.T. 304) was that at a time when he claimed to be in fear for her safety he permitted her to go out dancing unescorted. Counsel made an offer (R.T. 223) to show that she had been in a particular night spot. The Court then went on to say that even if she were the most unfaithful person in the world her husband "might very well love her very much and know that she is a very unfaithful person. I don't think it has any materiality here." The Court continued: "I don't think we'd better pursue this any further. I don't want to hear any more about what she does, her activities, any further.\* \* \*" (R.T. 224) For another full page the Court reiterated its view that the questions were not directed at probative matters and reasserted that it had "common knowledge" of the fact that many





people "have a high regard" for husbands and wives who are unfaithful. Then in a sudden reversal, while reiterating its view that there was no probative value, the Court said: " \* \* \* rather than sustain the objection on my own motion, you go right ahead." (R.T. 225) Defense counsel, quite reasonably, we submit, in view of the Court's evident hostility to the line of questioning, moved to something else rather than risk the further ire of the trier of fact. With all due deference to the District Court, the learning of mankind from Solomon, who tells us: " \* \* \* jealousy is cruel as the grave: the coals thereof are coals of fire, which hath a most vehement flame" (The Song of Solomon, Chapter 8, verse 6), to the modern science of psychiatry (Abrahamsen: Crime and the Human Mind, New York 1944, Chapter 8, "The Background of Murder" page 162 et. seq.) is that jealousy is a powerful, distorting and anxiety-producing emotion.

We go back to the leading case of Alford v. United States, 282 U.S. 687 (1931), to demonstrate that what the Court did here was improper. Cross examination was there held to be exploratory and the Court said that it was not usually appropriate to require a disclosure of the purpose of an inquiry, nor is it necessary in order to establish



prejudicial error to show that the examination would have been successful. (Id. at 692) The examination up to the point where the Court cut in had not been lengthy. The questions were designed to contradict the witness's testimony in chief about her husband's state of mind and her own and to cast serious doubt on the government's theory of the case. We submit, most respectfully, that Alford, supra, establishes once and for all that cross examination is a right and not a privilege. That right was denied to Battaglia as to a critical government witness. We urge this Court to reverse the conviction and afford him a new trial at which he will have an opportunity to exercise the right of cross examination.



### POINT III

THE TRIAL COURT ERRED BY FAILING TO DISMISS THE PROSECUTION WHICH WAS FATALLY TAINTED BY THE GOVERNMENT'S USE OF ELECTRONIC "BUGGING" SURVEILLANCE AGAINST THE DEFENDANT BATTAGLIA IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; IT FURTHER ERRED BY IMPROPERLY AND UNREASONABLY RESTRICTING THE SCOPE OF THE DEFENDANT'S INQUIRY AT THE HEARING ON THE DEFENDANT'S MOTION DIRECTED AGAINST THE ELECTRONIC SURVEILLANCE.

The Trial Court focused its attention on the issues and procedure of the hearing as though it were strictly analogous to a hearing on the suppression of tangible evidence obtained by the government as the result of unlawful search and seizure, that is to say, as if the sole issue were whether the government's case was derived from the products of an unlawful search and seizure. In the defendant's motion (C.T. 63-64) not only is the traditional suppression asked for, but also an outright dismissal with prejudice against the government's renewing the charges is asked for, and the Third, Fourth, Fifth, Sixth and Ninth Amendments to the Constitution are explicitly relied on. We will treat separately in turn the traditional search and seizure aspect; the intrusion against the Sixth Amendment right to counsel; the proper scope of the defendant's remedy where the bugging has the pervasive and intrusive





character shown here; the Trial Court's improper blocking of the defendant's attempt to develop the full facts, including surveillances not disclosed by the government. Every one of these aspects, we respectfully argue, warrants and indeed requires a reversal of the conviction, or at very least a remand for a full hearing which will present a proper record for the review of this Court.

A. The Issue Viewed, as the Trial Court Did, as Turning Solely on the Use of the Products of the Government's Illegal Activity in Developing the Evidence Presented at Trial.

Even though for the reasons set out below we urge that the government's view accepted by the Trial Court was erroneous, nevertheless on that view the case should be reversed. The sole witness proffered by the government at the hearing, Agent Fauver, testified on direct examination (Statement of the Case, supra, 31-32 ; R.H. 23-73) that he investigated the matters which came to be the case against Battaglia as a result of a complaint made to the Tucson police department, and that all the other witnesses were developed either as result of conversations with Greenwell and the people suggested by Greenwell, or as a result of suggestions made by Mr. Corey, the Department of Justice attorney who conducted the Grand Jury proceedings and the trial on the merits below.



Mr. Corey has represented that he did not know of the electronic surveillances and we take, and are happy for this Court to take, that representation without question. If there were nothing further to the matter, under the view of the case we are now discussing, the government's showing would be strong and the defendant's weak. However, Agent Fauver was from Phoenix, and while conducting this investigation he was in contact with the investigative clerk, Cornet, (Statement of the Case, supra, 32 ; R.H. 236-250) and with Agent Johnson (Statement of the Case, supra, 31-32 ; R.H. 73-219), both of whom actually listened in through the bugging devices. Agent Johnson had been investigating Battaglia since 1961 (216-217). His file number on Battaglia was 92-152 and the original report from the Tucson police to the local FBI went forward to Phoenix under that file number (R.H. 205-207). The number 92 was the FBI administrative number for an anti-racketeering or Hobbs Act investigation. The case which Agent Fauver undertook (this case) had an FBI number of 92-482, and yet it was Fauver's testimony that although he went from Phoenix to Tucson to investigate Battaglia he never looked at the Tucson file of an active investigation of the same crime, of the same man against whom he was conducting an investigation. (R.H. 61, 66)



Of course the Trial Court saw and heard the witnesses, but we submit that no demeanor or look of official candor radiating from FBI witnesses can make plausible this narrative in which Agent Fauver eschews the opportunity to learn what Agent Johnson's investigations had revealed against Battaglia and Agent Johnson disdains to tell his brother officer what he knows. Perhaps this is not enough to upset the government's initial showing, but when it is combined with Agent Johnson's testimony about there being no tapes we submit that the boundaries of credibility are overstepped. That testimony is set out in our Statement of the Case, supra, at 33-36 and appears at R.H. 76-84. That testimony shows, we submit, an effort by one of the government's police agents to conceal from the Court an important part of the factual background of the investigation and to cover up that concealment with a fabrication. In order to believe Johnson's testimony one first has to explain why he initially maintained that he had no tape equipment for the purpose of making recordings and then believe that though the FBI had the technical capability of installing microphones in a man's home and place of business they lacked and could not obtain the technical capability required to fix a tape recorder, and that rather than fix the machine Agent Johnson tried, and made note of, a succession of wholly unsuccessful





tapes. Indeed investigative clerk Cornet, Johnson's fellow listener on the eavesdropping, testified that the tape machine in the Tucson office had not worked since 1961 and that no one had bothered to fix it. (R.H. 242) The machine, according to the testimony of the government, was little more than an artifact, an objet d'art, remaining useless and inoperative during the period from January to March of 1961, May to October of 1962, May to August of 1963, and June to August of 1964, when according to the government (see statement of Mr. Cunningham R.H. 20-22 quoted in our Statement of the Case, supra 28-30 ) electronic surveillances of the Battaglia home, business and associates were had. This obviously was not a satisfactory state of affairs as far as the FBI was concerned, because Agent Johnson must have wanted to use the tape recorder when he put four different tapes on it in an effort to obtain a recording, but if Johnson and Cornet are to be believed, putting four different tapes on the machine represented the maximum effort the FBI could mount (over the period from January of 1961 until August of 1964) to get its tape recorder fixed.

This endeavor by police agents of the Federal government to falsify the facts and to mislead the Court (and perhaps the attorneys of the Department of Justice as well) calls for



the invocation of the well-known doctrine that fabrication and spoilation of evidence give rise to a presumption that the truth is unfavorable to the fabricator's position. When the deception about the making of tape recordings of the electronic surveillances is considered along with the inherent improbability of the existence of a "wall of separation" between what Johnson knew and had learned from the bugging, and Fauver's investigation of Battaglia, we submit that the government's case is so weakened and tainted that the government has failed to carry its burden.

B. The Government's Violation of Battaglia's  
Sixth Amendment Right to Counsel

Joseph Soble, a Tucson Attorney, who represented Battaglia and filed motions on his behalf and continued to act as local counsel through the proceedings in the District Court, testified that in the spring of 1964 Battaglia had related to him his version of an argument with Greenwell and his (Battaglia's) apprehension that it might be twisted, and from time to time they subsequently discussed the problem at Battaglia's home and the offices of Tucson Vending, certainly through July or August of 1964. The FBI admitted that on 7/14/64 they overheard a conversation between Battaglia and Soble. The Trial Court was strenuously disinterested: "It



shows overhearing what a client and his attorney say, but what materiality?" (R.H. 165) (We complain below, D,infra, that the Court refused to permit counsel to develop the location of this surveillance.) The test of the materiality to the Court was solely whether the FBI'S illegal activity led to the development of the case. The Court insisted that counsel show a relationship between the proposed evidence of Greenwell and the illegal activity (R.H. 164-165). This is but one of many examples of the Court's view that the only possible issue was whether the Greenwells had been discovered by the FBI as the result of bugging, but the defendant's motion specifically relies on the Sixth Amendment (C.T. 65) and the affidavit in support of it refers to the intrusion in the relationship with Battaglia's attorney, Mr. Soble (C.T. 66). If the Trial Court's view were correct, then once a complainant is discovered by innocent means the Federal police are free to endeavor to overhear, electronically or otherwise, confidential conversations between the defendant under investigation or indictment, and his lawyer. Such, of course, does not even begin to be the law. Though it is not necessary to our conclusion, we point out most emphatically that there was never any suggestion or hint that Mr. Soble and Mr. Battaglia were





engaged in any improper, unworthy or illegal activity. The most recent and definitive pronouncement of the Supreme Court of the United States compels a reversal. In that case, United States v. Hoffa, 385 U.S. 293 (1966), a government informer reported the activities of defense counsel during a criminal trial (known for purposes of the opinion as the "Test Fleet case") or at least so the Court assumed for the purposes of deciding this issue. (Id. 306) At a subsequent trial for tampering with the jury in the Test Fleet case, the defense of a violation of the Sixth Amendment privilege was raised. While the Court rejected that defense as to the jury-tampering conviction, it flatly said: "\* \* \* if the Test Fleet trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as constitutionally defective. Cf. Black v. United States. . . " (Id. 307) The Court approved the holdings of Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953) and Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951). The Black case to which the Court refers, United States v. Black, 385 U.S. 26 (1966) is extremely close to the situation in this case. There the investigating agents were pursuing a criminal investigation and incidental to it overheard conversations between a defendant and his lawyer,



- C. The Indictment Should Have Been Dismissed and the Government Barred from Prosecuting Battaglia for Offenses Which it Sought to Discover by Pervasive Electronic Intrusions into the Privacy of his Home and Offices

We explicitly asked in our motion (C.T. 63) that the indictment be dismissed and the government barred from prosecuting Battaglia for the offenses covered by the indictment.

Though defense counsel continued on a number of occasions to return to the broader questions and referred to other Amendments ranging from the Third to the Ninth, the Court typically ignored these contentions and focused on the search and seizure question, e.g., R.H. 140. While the suppression of evidence which is the result of illegal activity on behalf of the government is a remedy, it is by no means the only remedy. Where the Federal government destroys a defendant's rights under the Fifth Amendment by compelling him to testify in the face of a claim of the privilege against self-incrimination, the government is barred from prosecuting him; it must confer "absolute immunity" against further prosecution for the offense to which the question relates. Counselman v. Hitchcock, 142 U.S. 547 (1892), at 585, 586. The vitality and correctness of Counselman in stating the Federal standard was recently affirmed in Albertson v. Subversive Activities



Control Board, 382 U.S. 70 (1965). Though as a matter of abstract logic the sanction for the violation of the Fifth Amendment right to silence could be a mere prohibition of the use of evidence derived from that violation, that is, a requirement on the government to show an untainted source for its case. Cf. Malloy v. Hogan, 378 U.S. 1 (1964) and Murphy v. Waterfront Commission, 378 U.S. 52 (1964). Nevertheless it is firm Constitutional doctrine that a Federal invasion of the Fifth Amendment privilege bars prosecution in the area of the invasion, whether or not the case comes from an independent source. We think that that is the appropriate remedy here. The intrusions into Battaglia's office, and more importantly into his home, over so long a period of time, offend against his rights to be free of a general search, Berger v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_ (1967); 18 L. Ed. 2d, 1040, and destroyed the privacy and sanctity of the home and marriage which the Third, Fourth, Fifth and Ninth Amendments taken together set beyond the reach of state power. Griswold v. Connecticut, 381 U.S. 479 (1965). We submit that only a flat bar to prosecution will be an effective deterrent and an adequate vindication of the defendant's rights against electronic bugging. The special vice of such snooping is that, unlike





the search by police for tangible objects, the victim is unaware of the violation of his rights. When the violations do come to light it is generally by grace of the government's disclosure and the defendant is largely at the mercy of the government as to discovering the facts of what occurred. Thus in the Black case, Black v. United States, 384 U.S. 927 (1966) and 384 U.S. 983 (1966), it was only after certiorari had been denied that the government disclosed existence of the bugging of conversations between Black and his attorney. We submit that where the defendant is so peculiarly at the mercy of the government to inventory its own wrongdoing, the rule of the immunity cases rather than the rule of the search cases is the proper and effective one. In this case the bugs were maintained well into the period of the events covered by this investigation, and maintained with a specific view to prosecuting Battaglia under the very statute for which he stood trial.

Though we think this Court has the power to do so, we recognize that it may be reluctant to invoke the remedy we ask for here, absent a controlling decision of the United States Supreme Court, but we wish to make our claim firm so that in the event of the necessity of further review we may present it to the Supreme Court.



D. The Court Improperly Restricted the Scope of  
the Defendant's Inquiry as to the Government's  
Electronic Surveillances

The Court abbreviated the inquiry into the violation of the defendant's Sixth Amendment privilege, as we detail, supra, 65-68 . The Court refused to permit inquiries which sought to discover who authorized the installation of the microphones. [The colloquy with the Court is quoted supra, [ 37 ], in our Statement of Facts (R.H. 91-92)]. The Court, without objection from the government, blocked inquiry into the physical nature of the installation (R.H. 140-141). The Court refused to allow inquiry as to the location of the microphones which accomplished the surveillance (R.H. 167-169), and refused the production of Agent Johnson's memoranda which were filed in the same file with the electronic logs (R.H. 207-216). The Court refused to hear the testimony of the witness Adcock (R.H. 219-227), a former officer of the Tucson police intelligence unit, who had conducted surveillances, along with an FBI agent, of Battaglia, and had been told by that agent that there was an electronic surveillance at a location which the government's concession did not include. The Court rested its ruling on an evidentiary ground: the repetition on the



stand by former Sergeant Adcock of the Tucson police of what Agent Flynn of the FBI (since deceased), had told him was, in the Court's view, hearsay. Counsel argued that it was an admission against interest (R.H. 225). Clearly an admission made by an agent of the government which contradicted the government's repeated contention that it had disclosed all of the surveillances, was an admission against its interest. Agent Flynn was, very literally, an agent of someone, and that someone was the Federal government. His stating a fact to Adcock which was contrary to the government's interest and position at the hearing was competently admissible through Adcock as an exception to the hearsay rule. (4 Wigmore: On Evidence, 3rd Ed., §1048, §1078).

The Court likewise refused to hear the testimony of Agent Snell, who had actually made the physical installations, on the ground that his testimony would have been immaterial (R.H. 183-187; 251-252). An obvious purpose of these inquiries was to show the existence of other undisclosed surveillances. We think they were additionally necessary to give a full and meaningful picture of what transpired to this Court. Some of these inquiries were exactly like the ones which the Supreme Court required the Solicitor General to





furnish in the Black case. In its memorandum preceding the reversal, at 384 U.S. 983 (1966), the Court required the government to disclose the particular kind of apparatus, and the persons who authorized the installation, as well as other information. It seems strange that matters which the Supreme Court felt germane to its determination of an issue of electronic surveillance should be consistently held immaterial by the District Court here and denied to this Court on this review.

The crux of the government's contention, wholeheartedly adopted by the District Court, was set out in its written reply to the defendant's motion (C.T. 69) and its memorandum on the scope of the hearing (C.T. 75). Relying on Nardone v. United States, 308 U.S. 338 (1939), the government argued that the scope of the hearing was limited to the government's concessions, and that the defendants could not at the hearing attempt to develop other undisclosed bugs unless they first established the existence of such bugs. Aside from the circularity of such reasoning, it represents a misplaced reading and reliance on Nardone. Mr. Justice Frankfurter's opinion makes perfectly clear that the rule is a rule of judicial administration; it was designed to prevent an exploration



of the government's evidence before trial. (Id. at 342) That rationale, of course, has no applicability here. The government, even on its theory, was obliged substantially to disclose its evidence and show it to be untainted by its admitted taps. Furthermore, the blocked inquiries related not to the substantive evidence to be produced at the trial, but to the techniques, identity and activity of government police agents who were not, and indeed could not have been, called at the trial. The other important rationale is that to give a hearing in every case where there was a naked claim of eavesdropping activity would "\* \* \* subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers." (Id. at 342) But that rationale is entirely without relevance in this case. The government had admitted its trespass installation of trespass microphones in violation of the Fourth Amendment. This was no interruption of orderly judicial proceedings to see whether the government had possibly indulged in some wickedness; the government had admitted its wrongdoing but insisted that its inventory of the wrongdoing was binding and conclusive upon the defendant. It is understandable that the government should concentrate on its repentance and wish to minimize its wrongdoing. How gross an



intrusion of the defendant's Constitutional rights is involved here may be seen in the determination of the United States Supreme Court in the recent case of Berger v. New York, \_\_\_\_\_ U.S. \_\_\_\_\_ (1967), 18 L. Ed. 2d, 1040, and in particular the condemnation by the Court for the renewal for two month periods of the eavesdropping and the failure to require a prompt return. (Id. at \_\_\_\_\_ ; 18 L. Ed. 2d at 1052, 1053). The Court noted that "\* \* \* Fewer threats to liberty exist which are greater than that posed by eavesdropping devices\* \* \* " (Id. \_\_\_\_\_ ; 18 L. Ed. 2d, 1054), and against that consideration, in language most apt to the situation at bar, wrote:

"By its very nature eavesdropping involves an intrusion on privacy that is board [sic] in scope.

As was said in Osborn v United States, 385 US 323, 17 L ed 2d 394, 87 S Ct 429 (1966), the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments," and imposes "a heavier responsibility on this Court in its supervision of the fairness of procedures . . . " (Id. \_\_\_\_\_ ; L. Ed. 2d, 1050)





There is ample support to be drawn from the fantastic story of Agent Johnson about the non-existence of the tapes, and from the refused testimony of former Sergeant Adcock of the Tucson police that the FBI had told him about bugs other than those disclosed by the government, for the belief that a full adversary hearing on the government's bugging would disclose a very different state of facts for the judgment of a District Court or the review of this Court. We respectfully submit that the especially heavy responsibilities of supervision in connection with eavesdrop bugging of which the Supreme Court speaks in Berger, supra, require that this case be reversed and a new trial ordered, or at very least be remanded with instructions to the District Court to hold a full hearing. Black v. United States, 385 U.S. 26 (1966).

#### CONCLUSION

THE CONVICTION OF THE DEFENDANT BATTAGLIA SHOULD BE REVERSED WITH INSTRUCTIONS TO THE DISTRICT COURT TO ENTER A JUDGMENT OF ACQUITTAL, OR IN THE ALTERNATIVE THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED, OR IN THE ALTERNATIVE THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER HEARING ON THE GOVERNMENT'S ELECTRONIC EAVESDROPPING.

Respectfully submitted,  
Albert J. Krieger  
Robert Kasanof  
Attorneys for Appellant Battaglia

August 1967



## APPENDIX A

### CERTIFICATE OF COMPLIANCE WITH RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert Kasanof



## APPENDIX B

### INDEX TO EXHIBITS

Note: We index the exhibits in accordance with the transcripts furnished to us. We first index the exhibits admitted at the trial on the merits, the record of which has been referred to in the brief as "R.T.". Government's Exhibits 1 through 18 are admitted under, and relate to, the stipulation which appears in the clerk's transcript, pages 83-89.

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38 Interview Report	272
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<u>DEFENDANT'S EXHIBITS</u>	<u>IDENT'D</u>	<u>REC'D</u>	<u>WITH-DRAWN</u>
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#### Exhibits Admitted at Hearing

Note: The following exhibits were admitted at the hearing, the transcript of which has been referred to in the brief as "R.H.".

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## APPENDIX C

### UNITED STATES CONSTITUTIONAL PROVISIONS

#### Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

#### Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

#### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a



witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

#### Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.





**In the United States Court of Appeals  
for the Ninth Circuit**

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**CHARLES JOSEPH BATTAGLIA, JR., APPELLANT**

*v.*

**UNITED STATES OF AMERICA, APPELLEE**

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**On Appeal from the Judgment of the United States  
District Court for the District of Arizona**

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**BRIEF FOR APPELLEE**

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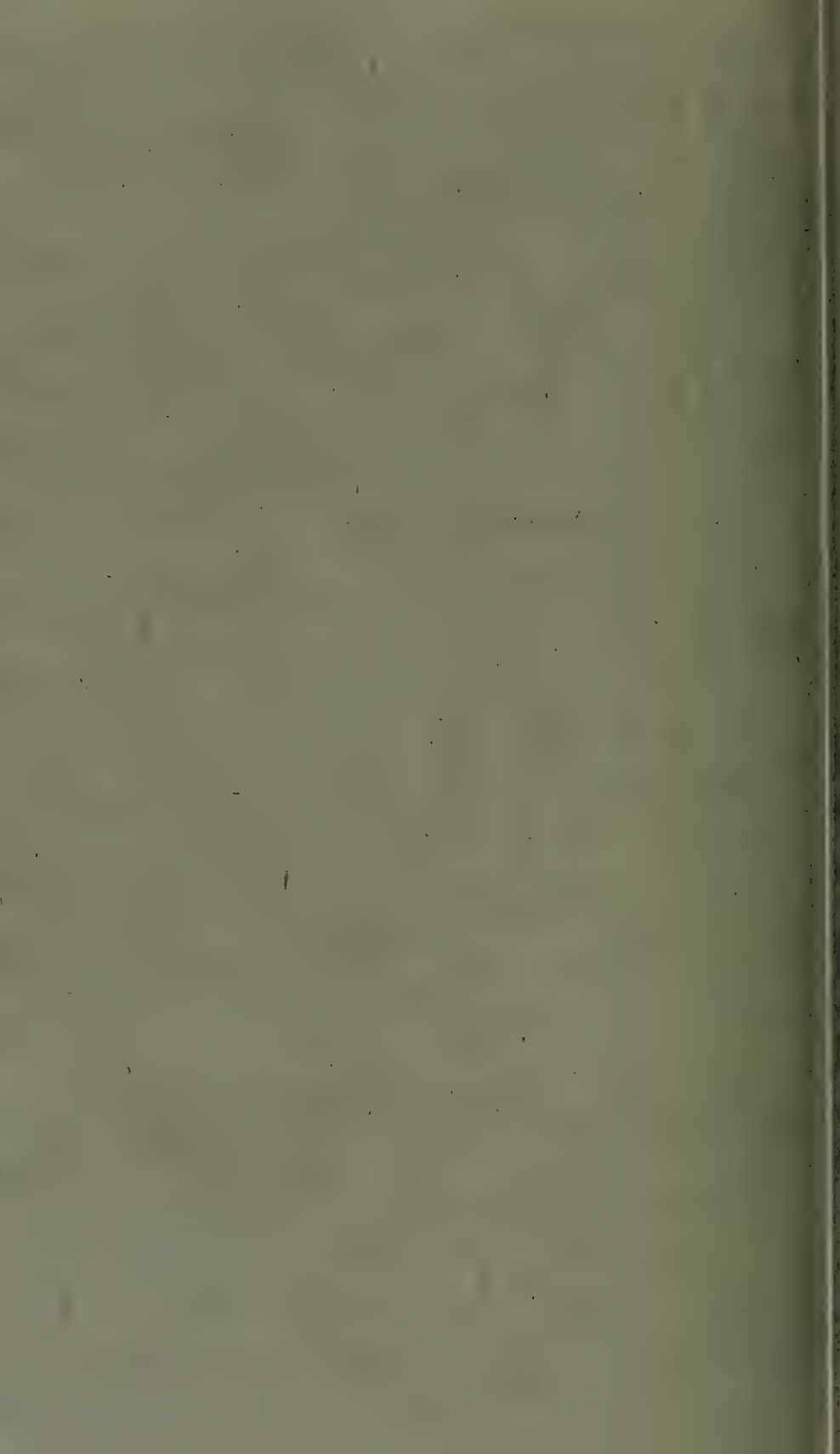
**ATTORNEYS FOR APPELLEE.**

**FILED**

**SEP 1 1967**

**WM. B. LUCK, CLERK**

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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 21784

**CHARLES JOSEPH BATTAGLIA, JR., APPELLANT**

*v.*

**UNITED STATES OF AMERICA, APPELLEE**

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**On Appeal from the Judgment of the United States  
District Court for the District of Arizona**

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**BRIEF FOR APPELLEE**

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**I.**

**JURISDICTIONAL STATEMENT OF FACTS**

On March 5, 1965, an Indictment was returned by the Federal Grand Jury sitting at Tucson, Arizona. (Clerk's Certificate to Record on Appeal, Item 1. Hereinafter, we will refer to the Clerk's Certificate as "C.C."; "R.T." refers to the reporter's stenographic transcript of the trial in two volumes, covering the proceedings of January 11, 19, and 20, 1967; "R.H." refers to the reporter's transcript of the hearing on

defendant's motion to suppress, covering the proceedings of January 16, 17, and 18, 1967. Other transcripts will be referred to by dates).

Appellant Battaglia, and Spinelli and Estes were charged with a violation of 18 U.S.C. 1951 in that they, while operating the Tucson Vending & Amusement Company, interfered with interstate commerce. It was alleged that on or about December 30, 1963, the defendants obtained space for a coin-operated pool table device and a share of the profits from the operation of said device by use of threats against Jerome C. Greenwell, the operator of the Diamond Pin Lanes Bowling Alley in Tucson. In a severed trial, Spinelli and Estes received a judgment of acquittal on December 9, 1965.

To aid the defendants as to the time periods involved, the Government tendered a Bill of Particulars on April 14, 1965 (C.C. Item 7) covering dates from December, 1963 to April, 1964.

On March 24, 1965 defendants moved for a change of venue and/or in the alternative, for a Continuance (C.C. Item 3). The trial date, originally scheduled for May 4, 1965, was set over to June 30, 1965.

On June 28, 1965 (C.C. Item 9) Defendant Battaglia moved for a Continuance on the grounds of ill health. Trial date was rescheduled for September 7, 1965. By reason of the claim of continued illness by the defendant, and by reason of the desire of the defendant to change counsel, the trial date of September 7, 1965 was vacated and the new date set was December 7, 1965.



On December 2, 1965 (C.C. Item 12), Battaglia moved for a Continuance citing his ill health as grounds. The trial date was rescheduled for March 15, 1966.

On March 9, 1966 (C.C. Item 18) Battaglia claimed illness and moved for a Continuance. Trial date was re-set for May 24, 1966.

On May 19, 1966 (C.C. Item 19) Battaglia, claiming ill health, moved for a Continuance. Trial was re-set for September 22, 1966. On September 20, 1966 (C.C. Item 17) Battaglia moved for a Continuance on the ground of ill health. The trial was scheduled for January 10, 1967.

On January 10, 1967 (C.C. Item 21) Battaglia moved for a Continuance claiming ill health. This motion was denied and trial was scheduled for January 11, 1967 (see R.T. Jan. 10, 1967, p. 3, line 22-24; p. 18, line 8-10).

On January 11, 1967, Battaglia waived trial by jury (C.C. Item 22). After the jury was dismissed, the Court noted for the record (R.T. p. 6) that the Government had disclosed the use of electronic surveillance concerning the defendant. The Court allowed defense counsel time in which to file a motion to suppress evidence. Said motion was filed on January 16, 1967. On January 16, 1967, the defendant appeared in a wheel chair, in hospital garb and attended by ambulance attendants, and with a supply of oxygen. The hearing commenced at 11:00 A.M. (R.H. Jan. 16, 1967). At 5:00 P.M. the hearing was recessed.

On January 17, 1967, the hearing was resumed. During a colloquy between court and counsel, the Court noted that the defendant appeared to be in physical difficulty. The court called for an immediate recess (R.H. p. 114) desiring to obtain a medical evaluation report before proceeding with the hearing. The defendant returned to the hospital and Dr. Richard L. Dexter, appointed by the Court, examined the defendant and made his report to the Court (R.H. p. 118-121; C.C. Supplemental Record—Report of Dr. Dexter filed January 18, 1967). On January 18, 1967, the Court concluded that the defendant was capable of appearing and assisting in his defense and the hearing was resumed. The defense motion was denied and the Court set trial to commence on January 19, 1967.

Trial to the Court was concluded on January 20, 1967, at which time Battaglia was found guilty of the charge.

On February 17, 1967, the Court sentenced the defendant to the custody of the Attorney General for a period of ten years and ordered a fine of ten thousand dollars.

This appeal is pursuant to 28 U.S.C.A. Sec. 1291.

## II.

### STATEMENT OF FACTS

Jerome C. Greenwell purchased the Diamond Pin Lanes, a bowling alley complex in Tucson on June 1, 1963 (R.T. p. 83) and operated the alley with his manager, Ida Chapman. He had met Charles J. Bat-

taglia in 1958 when they were introduced by a Mr. Louis Serota (R.T. p. 84). Early in June, 1963, Greenwell met with Battaglia and a discussion ensued regarding the placement of vending machines on the bowling alley premises (R.T. p. 86). Some machines were installed and did well. Greenwell and Battaglia met at the bowling alley in July, 1963 and talked about putting in additional vending and pin game machines (R.T. p. 87). Greenwell pointed out that he had a contract with the Canteen Company regarding a cigarette machine, but Battaglia told him that he would pay off the Canteen contract (R.T. p. 89). Greenwell agreed that if Battaglia (Tucson Vending Co.) would guarantee to pay any losses sustained by the Canteen Company, then Greenwell would permit him to put in the Tucson Vending machine (R.T. p. 90). A letter was sent to Greenwell (Exhibit 20) promising to indemnify losses (R.T. p. 91) and the additional Tucson Vending machines were installed on the bowling alley premises (R.T. p. 92). Battaglia wanted Greenwell to sign an exclusive contract with Tucson Vending Co. (Exhibit 21) (R.T. p. 92) but Greenwell refused until the Canteen Company contract was completed. This exclusive contract, Exhibit 21, had been offered to Greenwell as early as August, 1963 (R.T. p. 93).

Greenwell and Jack Gumbin, the lessee of the cocktail lounge at the Diamond Pin Lanes, agreed in December of 1963 to place a coin-operated pool table in the bowling alley (R.T. p. 95) after Gumbin had reported to Greenwell that Gumbin's pool table at the

cocktail lounge was doing well. In January, 1964, the pool table was delivered to be placed in the bowling alley (R.T. p. 95). A few days after this installation Battaglia came in to see Greenwell at the bowling alley (R.T. p. 96), angry that the pool table was not placed at the alley by Tucson Vending Company. Battaglia claimed that they had an agreement, and Greenwell told Battaglia that there was no exclusive agreement, verbal or otherwise. A heated argument ensued. Battaglia reminded Greenwell what happened to Serota. (R.T. p. 97). Greenwell explained that Serota had been found murdered in the trunk of his car.

Battaglia also said "You have a very attractive wife" (R.T. p. 98). "I know which way she goes home, and I'm sure you don't want anything to happen to her, and you don't want anything to happen to your factory" (R.T. p. 99).

When Greenwell and Battaglia both simmered down, Battaglia offered to purchase the pool table from Jack Gumbin (R.T. p. 99). Gumbin didn't agree and the pool table remained at the alley.

One morning after this exchange, Greenwell was informed that the pool table was damaged. The table had been slashed (R.T. p. 100).

Greenwell phoned Battaglia at the Tucson Vending office and accused Spinelli and Estes, both of Tucson Vending, of having slashed the table. Battaglia said "If you think the slashing of the cover is so bad, how would you like to have a bowling ball through the slate?" (R.T. p. 101). Greenwell stated that he was

in fear and told Gumbin to remove the pool table. (R.T. p. 102). It was replaced by a pool table from Tucson Vending.

Previous to the pool table incident, Greenwell had permitted Tucson Vending to replace the Canteen cigarette machine on the strength of the promise in the letter. (Exhibit 20) In the fall of 1963, Diamond Pin Lanes, Inc. was being sued by Canteen Company. (R.T. p. 104) Greenwell turned over the notice of suit to Tucson Vending and "forgot about the matter" because of the promise in the letter. (Exhibit 20) Early in 1964, the sheriff posted notices at the bowling alley concerning the sale of Diamond Pin Lanes properties to satisfy the Canteen judgment. (R.T. p. 104-5) Greenwell contacted the sheriff's office and was referred to the attorney representing Canteen, who told him he had to pay something on the judgment. Greenwell received a check for four hundred dollars (R.T. p. 105) from Tucson Vending marked "Advancement against commissions." Greenwell wouldn't use the check for a while, because the letter (Exhibit 20) meant to him that Tucson Vending, not Diamond Pin Lanes, Inc., was to indemnify any losses on the Canteen contract. When the sheriff's office was going to go ahead with the liquidation, Greenwell took the check to the Canteen attorney, who accepted the money as a part payment on the judgment, released the attachment, and gave Greenwell time to pay the balance. (R.T. p. 106) Greenwell signed the exclusive contract desired by Battaglia in April, 1964. (R.T. 107, Exhibit 21)



When Greenwell and Battaglia had their heated discussion prior to the pool table slashing, Greenwell did not immediately tell his wife of Battaglia's threat about her. Instead, he told her to take a different route home. After several weeks of telling Mrs. Greenwell which roads to take home, to avoid the darkened route she usually used, a domestic quarrel ensued. Greenwell then told his wife of the incident of the slashed pool table and the argument with Battaglia.

Mrs. Greenwell talked to a city detective of the Tucson Police Force and Mr. Greenwell reviewed the situation with the detective in March, 1964. (R.T. p. 108; Exhibit 19, Defendant's A)

On January 19, 1967, the Court admitted into evidence Government Exhibits 1 through 17, which were covered by a Stipulation and Agreement signed by defendant and his counsel and government counsel. (R.T. p. 32, line 6-9; p. 33, line 4) Exhibit 1 is a Business License issued to Tucson Vending showing Sal Spinelli as owner.

James Reeves and Larry Edmiston, formerly employed at Precision Motors, a gas station and car agency, were called as witnesses. Reeves stated he had received instructions from Battaglia as to the charge sheets on car servicing for the Tucson Vending Co. (R.T. p. 42, line 10-17) Edmiston testified he had seen Battaglia, Estes and Spinelli together around February, 1964 at which time Battaglia instructed him as to a date for servicing one of the vending company vehicles. (R.T. p. 47, lines 2-13)



Hugh Downs a bowling alley and theatre manager, recalled that Battaglia had a vending company (R.T. p. 51, line 3-11), and Don Thompson, a cocktail lounge operator, had been approached by Battaglia to put vending machines in at the cocktail lounge. (R.T. p. 58, line 7 to p. 59, line 11)

Ida Chapman was manager of the Diamond Pin Lanes from June, 1963 to February, 1964. She traced the business relationship between Battaglia and Diamond Pin, including Battaglia's desire for Greenwell to sign a contract with Tucson Vending (R.T. p. 72, line 13 to p. 74, line 20) in 1963.

Mrs. Greenwell testified as to the route she usually drove to get home at night, and to the insistence by Mr. Greenwell to change the route. She described the discord between them and how Mr. Greenwell came to tell her of the threats. (R.T. p. 217, line 13 to p. 219, line 1)

Don Bierschbach testified that he took over as manager of Diamond Pin, after Ida Chapman left in February, 1964. He described his relationship with Tucson Vending and with Battaglia. About late March, 1964, Bierschbach met Battaglia at another bowling alley, at which time Battaglia told Bierschbach that the dispute was none of Bierschbach's business,—to keep out of it or he would get his head bashed in. (R.T. p. 232, lines 14-22)

Thomas McCormick and Nathan Railey testified that they were working at Diamond Pin on the night of the pool table slashing, that they were alone and played on the pool table after 1 AM (R.T. p. 242, line

24 to p. 243, line 12). Later, Spinelli and Estes were admitted into the bowling alley to service the vending machines, and that after Spinelli and Estes were let out of the alley (R.T. p. 250, line 20-22), McCormick and Railey returned to the pool table for another game and found the table slashed.

Hoyt Wells saw the table in good condition earlier that night and observed the table slashed later that morning (R.T. 260-267).

Jack Gumbin corroborated Greenwell's joint purchase with him of the pool table. Greenwell was visibly upset when, after the slashing of the pool table, he wanted the table removed. It was subsequently replaced by a Tucson Vending table (R.T. p. 271, line 1-21). Agent Earl Fauver was the only witness called by defense and testified as to some of the interviews he had with various witnesses.

### III.

#### OPPOSITION TO SPECIFICATIONS OF ERROR AND SUMMARY OF ARGUMENT

1. Sufficient evidence to convict was presented to the Court to support its finding of an extortion and an effect upon interstate commerce.
2. The District Court did not restrict cross-examination of Mrs. Greenwell.
3. The defendant failed to show that the Government obtained any evidence or leads to evidence from electronic surveillance and that the Government violated his right to counsel. The Court did not improperly restrict the scope of the Motion to Suppress hearing.

## IV.

## ARGUMENT

**1. Sufficient Evidence to Convict Was Presented to the Court to Support Its Finding of an Extortion and an Effect Upon Interstate Commerce.**

The trial court found from stipulated evidence (C.C. Item 29) and from uncontroverted direct and circumstantial testimony that there was an extortion and an effect upon interstate commerce.

The indictment charges the defendant with affecting commerce "and the movement of machines, materials, and supplies for . . . Diamond Pin Lanes . . . , in such commerce, by extortion . . . ."

To invoke federal jurisdiction, it is necessary to show movement in interstate commerce. To invoke the sanctions of the Hobbs Act (18 U.S.C. 1951) there must be an effect upon interstate commerce by extortion.

Generally, supplies for the bowling alley came from the Brunswick Company in California (R.T. p. 61, line 22-25, p. 62, line 1). Six of the coin-operated devices that came to the bowling alley were shipped from California. (See Stipulation, C.C. Item 29, and Exhibits 13, 14, 15, 16 and 17). These are machines that are enumerated on the contract, Exhibit 21.

Specifically, the pool tables destined for Diamond Pin Lanes were moved in interstate commerce and traced by the Stipulation (C.C. Item 29) and Exhibits 2 through 12.

". . . It is not for the jury to determine what is or what is not interstate commerce—that is a

question of law . . . ." *Nick v. United States*, 122 F. 2d 660, 673.

The sale of goods which originated from out-of-state has been held to constitute interstate commerce. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963) (Reliance bought and distributed fuel oil entirely in New York, however, Reliance's supplier was an interstate business). In *De Gorter v. Federal Trade Commission*, 244 F. 2d 270, 280 (9th Cir. 1957) occasional out-of-state sales, advertisements in interstate publications and out-of-state origin of 25% of the products was held to be interstate.

The Hobbs Act language has been interpreted to apply to a business not itself in interstate commerce, *United States v. Malinsky*, 19 F.R.D. 426 (2 Cir. 1956), and to one which depended upon interstate commerce for its materials, equipment and supplies. *Hulahan v. United States*, 214 F. 2d 441, 445 (8th Cir. 1954).

There is basis in law, therefore, for the trial court to find that the movement of the pool tables was in interstate commerce. This was sufficient for the trial court to invoke federal jurisdiction.

We think appellant has misconstrued the import of *United States v. Stirone*, 361 U.S. 212 (1959), which is distinguishable from the instant matter. In *Stirone*, the Supreme Court reversed because the indictment, which charged interstate importation of materials, was broadened by the trial court in allowing the jury to hear evidence of the interstate *exportation*

of the finished product. The defendant, was thus tried on charges not in the indictment.

The Court agreed that the *Stirone* jury was entitled to convict on the evidence regarding the interference with the importation of materials. However, the "difficult question" as to the effect on shipments to be exported was not reached, because the Court agreed with the dissenting judges in the Court of Appeals that it was error to submit that question to the jury.

We do not read into this decision any approval of Judge Hastie's dissenting view as to the invoking of federal or state jurisdiction. On the other hand, the Supreme Court notes that the Hobbs Act speaks in "broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" (p. 215)

Having found that the devices moved in interstate commerce, we now reach the question of the effect on interstate commerce.

Commerce may be affected even though the actual movement of goods has ceased and the character of the goods altered in the hands of the consumer. *United States v. Stirone*, 168 F. Supp. 400, 496. In discussing the effect on interstate commerce the Court made this observation:

"... the only criteria which this court may properly employ to determine whether this act is applicable are whether the channels of interstate commerce have been used and whether the free



passage of articles therein has been threatened. The court correctly told the jury that *if the government's facts were believed*, interstate commerce had been affected by the conduct of the defendant. (Cit. therein). That statement was based upon a premise that a deliberate act which tends to prevent articles from being used once they have reached their destination after being shipped in interstate commerce dams up the stream of commerce and delays, obstructs, and affects interstate commerce as surely as though the same act had cut off the supply at its source." (emphasis ours)

It was established that the pool table at the bowling alley was slashed. The trial court found that "the only people on the premises during the time that this could have occurred was Spinelli and some other person, (Estes) and of course Spinelli is connected with Tucson Vending." (R.T. p. 311, line 21-23) Spinelli was the nominal owner of Tucson Vending Co. (Exhibit 1) The reasonable inference is that the slashing was done by Spinelli and Estes. (R.T. 2/17/67 p. 7, line 21) Here, then, is a deliberate act "which tends to prevent" the article from being used. This is evidence of an effect upon commerce.

There is no judicial standard set for measuring the effect on interstate commerce.

"The statute provides that effect 'in any way or degree' is sufficient. Congress itself has concluded that any effect upon interstate commerce in any degree caused by extortion or conspiracy contemplating extortion is in itself substantial.



The substantiality of the effect is not left open to judicial interpretation." *Malinsky, supra*, p. 428

Accordingly, the trial court properly invoked federal jurisdiction under the Hobbs Act.

It is well established that on appeal in resolving the issue of sufficiency of the evidence to sustain a conviction the reviewing court must view the evidence and all reasonable inferences which may be drawn therefrom in a light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80. And, as this Court has stated in the past, it will not second-guess a trier of the fact who has heard the testimony, scrutinized the witnesses and noted their demeanor on the witness stand and had the opportunity to place his reliance upon those whom *he* believes to have been telling the truth. *Perez v. United States*, 297 F. 2d 648-649 (9 Cir. 1961); *Maldonado v. United States*, 325 F. 2d 295 (9 Cir. 1963); *Davis v. United States*, 327 F. 2d 301 (9 Cir. 1964).

In *United States v. Crumble*, 331 F. 2d 228, 230 (7 Cir. 1964), Crumble was convicted of inducing one, Gloria Dixon, to travel in interstate commerce for the purpose of prostitution. Trial was to the court. In reviewing the case, the Court observed:

"The fact that Gloria Dixon, the chief witness for the prosecution, gave testimony before a Federal Grand Jury inconsistent with her trial testimony implicating the defendant and also, admitted she testified differently at a State investigatory proceeding goes only to the credibility of her trial testimony—a matter of resolution by

the trier of the facts. Her trial testimony was not without corroboration in the form of reasonable inferences which arise from the testimony of others and by what the record reveals with respect to the admissions and conduct of the defendant."

The testimony here shows that as a result of threats made by Battaglia, Greenwell was in a state of fear. (R.T. p. 102 line 20-22; p. 118, line 18-21; p. 123, line 10-12; p. 152, line 12-13; p. 189, line 20; p. 190, line 4-17; p. 218, line 26 to 219, line 1; p. 271, line 1-11) The trial court found sufficient evidence to hold that there was a generation of fear, an act of violence, and the replacement of the slashed pool table by one from Tucson Vending. This, we submit, supplies the element of extortion.

## **2. The Trial Court Did Not Restrict Cross-Examination of Mrs. Greenwell.**

Without detailing all of Mrs. Greenwell's testimony, it is clear that she corroborates her husband's statements as to the circumstances under which Mr. Greenwell told her of the threats. (R.T. p. 217, line 10 to p. 218 line 6)

Although not material, the trial court permitted defense counsel to pursue a line of questions concerning Mrs. Greenwell's attendance at a dog track and her attendance at dances. (R.T. p. 223) When the court questioned the materiality, defense counsel offered that such testimony would show that Mr. Greenwell should be worried about her attendance at a particular night club. Counsel argued that "proof

that the witness was accustomed to go out at night is a situation which *might* create suspicion and jealousy" (R.T. p. 224, line 21-23) and would bear on the victim's state of mind. (emphasis ours)

The Court suggested that this line of questioning had no probative value, and quite reasonably stated (R.T. p. 225, line 22) "If you want to go into it, I will withdraw my ruling and permit you to go ahead and go into this aspect of it; and rather than sustain the objection on my own motion, you go right ahead." Defense counsel indicated that to move forward was useless, but the Court reiterated (R.T. p. 226, line 4) "You make a record; you can put it in the record if you wish."

This colloquy took place after several minutes of exploratory cross-examination. Defense counsel moved on to other matters, then returned to his original premise regarding Mrs. Greenwell's visits to the dog track and her dancing. This time, however, counsel was more specific in his questions. (R.T. p. 229)

Q. During this period of time, January '64, February '64, March '64, April '64, did you go to the dog track?

A. I am sorry, I really don't know whether I did at that time or not.

Q. During that period of time, did you go dancing?

A. I really couldn't say. I don't remember if I did during those particular months or not.

If in fact, Mrs. Greenwell did visit night clubs or the dog track during that period of time, this would have no bearing on Greenwell's concern for her safe-

ty. As the trial court suggested, if defense counsel could show that Greenwell advised her to change her route because he didn't want her to stop by some tavern or some drinking establishment, this could affect Greenwell's credibility. (R.T. p. 225) But, counsel was unable to do so—not because of any claimed restriction on his cross-examination,—but simply because that was not the fact.

“The extent of cross-examination with respect to an *appropriate* subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.” *Alford v. United States*, 283 U.S. 687, 694. (emphasis ours)

The trial court did not abuse its discretion nor limit the defense from pursuing a full cross-examination of Mrs. Greenwell. The record shows clearly that defense retreated from its offer to show that Mr. Greenwell *might* be affected by jealousy and suspicion rather than Battaglia's threats. The right of cross-examination was not denied to the defendant.

**3. The Defendant Failed to Show That the Government Obtained Any Evidence or Leads to Evidence From Electronic Surveillance and That the Government Violated His Right to Counsel. The Court Did Not Improperly Restrict the Scope of the Motion to Suppress Hearing.**

On January 11, 1967, before the trial opened, Mr. J. F. Cunningham, a Department of Justice attorney, disclosed to the Court and defense counsel that electronic surveillance had taken place in connection with

the defendant. A verbal motion to suppress was made by defense counsel and a hearing was set for January 16, 1967.

At the hearing, Mr. Cunningham made a statement outlining the government's policy as reflected in the Solicitor General's statement, the fact that the surveillance was promptly disclosed to the Court and counsel, and conceded that the surveillance took place at the following locations at the stated time periods:

Residence of Joseph Hootner	1/23/61 to 3/13/61
Travelodge Motel, Los Angeles	1/12/62 to 1/13/62
Residence of Battaglia	5/25/62 to 10/ 1/62
and	5/ 9/63 to 8/12/63
Tucson Vending Co., Tanque Verde Road	6/18/64 to 8/ 7/64
Tucson Vending, E. Grant Rd.	9/23/64 to 11/20/64

It was also conceded that these electronic surveillances were maintained by microphones installed by trespass. (R.H. p. 19-23) All of the logs of the conversations in which Battaglia was a participant, or in which participants mentioned him, were turned over to the Court and defense counsel.

When the disclosure had earlier taken place, a colloquy ensued between the trial court and defense counsel as to the scope and import of the hearing, and the procedure to be followed.

Defense counsel made the following statements:

"... at the very least, the Government should proceed to show that its lawlessness has not infected this indictment." (R.H. p. 5, line 10-12)



prosecution. In *Silverman v. United States*, 365 U.S. 505 (1961) the Court held that conversations overheard by microphone surveillance installed by trespass were obtained in violation of the Fourth Amendment and could not be used in a prosecution of the parties to the conversation. It follows that evidence obtained by leads from such conversations also may not be used. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392.

The Government conceded that it trespassed in microphone surveillance and all logs reflecting the conversations thus illegally overheard were turned over to the Court and defense counsel. This takes care of the first issue completely.

The issue remaining at the hearing was whether or not the information in the logs was used directly or indirectly as evidence, or leads to evidence, in this prosecution, and if so, whether or not a substantial portion of the case was derived from the tainted source.

The Court properly limited the hearing to the remaining issue, waiting for defense counsel to show specifically from the logs what was contained therein that would taint any of the evidence.

It was the appellant's contention then, as here, that he was not bound by the extent of the Government's disclosure. We agree—but this takes us back to the first issue on a Motion to Suppress.

At this point we are back to a *defense burden* to show that other illegal devices were used. Since this occurred at the hearing, the Court could, but did not,



require affidavits setting forth allegations of *evidentiary* facts upon personal knowledge, or setting forth the source of the knowledge and grounds for this belief. (If a new hearing were to be requested at this point, pending appeal, this Court would require a solid showing by way of affidavits in order to decide if the petitioner should be granted a hearing.)

The trial court realized that this was to be a discovery expedition and permitted the defense counsel the opportunity to "fish." (R.H. 95) The voyage produced no fish.

When the appellant was unable to show any other illegal eavesdropping, the contention was made by an offer through defense witness Adcock. (R.H. 224-227) This was properly refused as hearsay.

Appellant now contends that Battaglia should be clothed with immunity from prosecution because he was the subject of illegal electronic eavesdropping, overlooking that Battaglia gave no testimony, did not claim or admit as his any of the overheard conversations in which he was a participant, and that nothing contained in the logs was used as evidence against him at the trial.

The short answer is that his conversations are not the product of any official compulsion, *Olmstead v. United States*, 277 U.S. 438; *Hoffa v. United States*, 385 U.S. 293; *Osborn v. United States*, 385 U.S. 323, therefore *Counselman v. Hitchcock*, 142 U.S. 547 is not applicable in the instant matter.

Appellant strenuously urges that the Government violated Battaglia's right to counsel. Let us examine this claim.

The logs of the electronic surveillance reveal two innocuous conversations between Battaglia and attorney Soble. One took place on June 21, 1963, at Battaglia's home and the other took place at the Tucson Vending Company office on Tanque Verde Road on July 17, 1964.

The June 21, 1963 monitoring took place approximately nine months before Greenwell reported to the Tucson police. (Exh. 19-Def.Exh.A.) It took place about *seven months prior to the alleged violation* described in the indictment and trial.

The July 17, 1964 monitoring took place after the alleged violation but before the indictment was returned on March 5, 1965. This monitoring occurred after there ceased to be a business relationship between Greenwell and Tucson Vending.

Soble testified in vague terms as to his representation of Tucson Vending Co. (R.H. 228) "Tucson Vending started sometime in 1963 . . . . Mr. Alch handled most of it; I was in on some of the discussions . . . . Mr. Alch did the majority of the legal work," finally placing his personal representation as beginning in March, 1964. Soble also related a conversation (R.H. 233) he had with Battaglia around March or April, 1964 regarding an argument Battaglia had with Greenwell. Soble did not state specifically where this particular conversation took place, but later stated generally that he had discussed matters with Battaglia at his home, at the Speedway office, and at the other offices of Tucson Vending on Tanque Verde Road.

It is interesting to note that the one conversation alluded to by Soble (obviously with consent from Bataglia as to the attorney-client privilege) took place at a time when there was no electronic surveillance.

Appellant weaves a web of sophistry with strands of speculation. The contention is that there *may* have been other electronic surveillance, particularly at the Speedway office location, and if so, this conversation *might* have been monitored. This is the "sheer guess-work" and the "mere conjecture" held insufficient in the past. *United States v. Flynn*, 103 F. Supp. 925, 930 (SDNY), *affirmed* 216 F. 2d 354 (2 Cir.), *cert. denied* 348 U.S. 909; *United States v. Weinberg*, 108 F. Supp. 567, 569 (D. D.C.). This is hardly the solidity of a claim that the government's case is tainted. *Nardone v. United States*, 308 U.S. 338, 341.

There are two important colloquies in the record of the hearing. In one (R.H. p. 144-154) the Court requested defense counsel to point out with particularity what evidence it could show as tainted. Counsel, unable to show any particular suppressible evidence, claimed that Greenwell's complaint was predicated on eavesdropping and therefore the *whole* investigation was tainted.

In the other (R.H. p. 175-188) defense counsel attempted to broaden the scope of the hearing as to the possibility of other surveillance and the speculative aspect was readily apparent when defense counsel made an offer of proof.

Defense counsel wanted testimony from former Agent Snell, who had made the physical installations of the microphones. Through Snell, counsel hoped to show that there were installations not disclosed by the Government and that such alleged surveillances were the basis for the original contact with Greenwell. (R.H. p. 176, line 8-12) It was obvious to the Court that testimony from Snell, even if it were to show that the Government had placed microphones not disclosed and that conversations between Battaglia and Greenwell were overheard, would not overcome the fact that the first FBI contact with Greenwell was in April, 1964 and that Greenwell reported the matter to the Tucson Police *independently* in March, 1964. In view of the defense's failure to make any showing as to Snell's possible testimony, we believe the Court ruled properly.

At the end of the hearing, Mr. Krieger stated that he was ready to subpoena Snell to avoid any procedural lapse. The Court stated (R.H. p. 252):

"You are not faced with that problem. In other words, the technical objection that you failed to request the Court to order subpoena be issued for him is of no consequence and *would not bar you presenting that situation at some later time.*"  
(Emphasis ours)

The defense did not later raise this issue at the trial, nor, more importantly, is there an affidavit now from Mr. Snell presented with appellant's brief, so that this Court could be fully apprised of the truth of the defense contention as to Snell.



Finally, we make reference to the recent case of *United States v. Carabbia* (6th Cir. decided July 31, 1967.) — F. 2d —.

After Carabbia had been convicted and pending appeal, defendant filed a motion for an order requiring the Department of Justice to examine its files to determine whether Carabbia had been subject to electronic surveillance. Government counsel admitted that a microphone had been placed in business premises under control of the defendant.

The case was remanded to the District Court with instructions to conduct a prompt and full hearing upon all aspects of the Government's use of electronic equipment and to make findings of fact and report to the Court.

The only difference from this case is that the hearing in *Carabbia* was held after the trial.

In the District Court's findings (Appendix B of the decision) there is a statement (note 3) of interest in our matter.

"Counsel for Mr. Carabbia attempted during the course of the hearing to undertake a wide-scale, independent investigation of varied governmental agencies in an effort to uncover further electronic surveillance. Taking into consideration the language of the Sixth Circuit Court of Appeals' order and the circumstances set out in this finding of fact, the Court deemed that such efforts on the part of defense counsel constituted nothing more than an *unwarranted stab in the dark and, therefore, did not allow counsel to pursue the same.*" (Emphasis ours)

The Court, at the close of our trial, made a specific finding that there were no instances where it appeared that the testimony was obtained or in any way was associated with the electronic surveillance or any other activities of the Government wherein a trespass was committed against the defendant. (R.T. p. 297, line 1-6)

We respectfully submit that the logs show no relationship to the instant matter, that the evidence used was free from taint and that the case arose out of independent origin.

# V.

## CONCLUSION

It is respectfully submitted that there is sufficient evidence to support the charge, that there was no restriction on cross-examination of any witnesses, and that the case submitted was entirely free of any taint. The conviction should be affirmed.

Respectfully submitted

FRED M. VINSON, JR.  
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EDWARD E. DAVIS  
*United States Attorney*

JO ANN D. DIAMOS  
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Three copies of the within Brief of Appellee mailed  
this 31<sup>st</sup> day of August, 1967, to:

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## APPENDIX A

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

A handwritten signature in dark ink, appearing to read "Joseph Corey", is written over a faint, circular official stamp.

Joseph Corey  
Special Attorney  
Department of Justice

## APPENDIX B

## SUPPLEMENT TO APPELLANT'S INDEX TO EXHIBITS

	<u>Identified</u>	<u>Admitted</u>
Government Exhibit 19, also marked	123	
as Defense A	47	124*

\* It is our recollection that this item was admitted for a limited purpose, as evidenced by the colloquy on pages 123 and 124 of the reporter's transcript of the hearing.

Defendants B, C, D, and E, are all single log sheets admitted as part of all of the logs offered by the Government under # 18.

## APPENDIX C

Section 1951, Title 18, United States Code, provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all

commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

United States Constitution, Amendment IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.





No. 21,786 ✓

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

F. J. BUCKNER CORPORATION, dba UNITED ENGINEER-  
ING COMPANY,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

---

## PETITIONER'S OPENING BRIEF.

---

SHEPPARD, MULLIN, RICHTER & HAMPTON,  
DAVID A. MADDUX,  
THOMAS C. WATERMAN,

**FILED**

**AUG 31 1967**

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Petitioner.*

**SEP 13 1967**



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*Petitioner,*

*vs.*

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---

## PETITIONER'S OPENING BRIEF.

---

### I.

### JURISDICTION.

The Decision and Order of the National Labor Relations Board, dated February 23, 1967 found that petitioner was guilty of certain unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

Jurisdiction to review the Board's Decision and Order is conferred upon this court by petition filed April 19, 1967 by F. J. Buckner Corporation dba United Engineering Company, an "aggrieved person", 29 USCA §160(f).

II.

STATEMENT OF THE CASE.

Mr. F. J. Buckner, the President of the F. J. Buckner Corporation which operates dba United Engineering Company [Tr. p. 22, lines 3-6]<sup>1</sup> decided to terminate Mr. Szczesniak on Friday, March 19, 1965 [Tr. p. 24, lines 8-16]. His decision was made only after he had talked with Mr. Thornberry, the International Representative of the Union [Tr. p. 23, lines 1-19; p. 28, lines 16-19] and Mr. Thornberry had agreed that Mr. Szczesniak should be discharged [Tr. p. 25, lines 1-18].

Subsequent to his discharge Szczesniak filed a written grievance [Resp. Ex. 1].

That grievance was settled on April 2, 1965. At that time, in conformance with the contract [Art. 8, G.C. Ex. 2], the Company and the Union, at step two of the grievance procedure [Art. 8, 2 G.C. Ex. 2], found the "Company had good and sufficient reason to terminate Mr. Szczesniak." [Resp. Ex. 6].

The committee settled the grievance in accordance with the contract [Art. 8, 2, G.C. Ex. 2], and set their settlement into writing [Resp. Ex. 6].

At some later time, Mr. Walker of the Union talked with Mr. Buckner and Mr. Loy [Tr. pp. 93-96]. The gist of that conversation was that Mr. Walker felt Step 4 of the grievance procedure should be used [Art. 8, 4, G.C. Ex. 2] but, upon finding Step 2 had been complied with, though he perhaps did not agree with

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<sup>1</sup>[Tr.] throughout refers to the transcript of the proceedings before the Trial Examiner, [TND] refers to the Trial Examiner's Decision and [G.C. or Resp. Ex.] to the General Counsel's or petitioner's herein; respondent's below, exhibits admitted into evidence at the hearing.

the result [Tr. p. 95, lines 14-15], neither he nor the Union took any action to institute proceedings under Step 4 of the grievance procedure [Tr. p. 95, lines 18-26]. Of course, the union was correct in its non-action since the grievance had been conclusively settled under Step 2 of the grievance procedure.

At the hearing in this matter the Trial Examiner admitted the affidavit of Frank Buckner over the objections of respondent's counsel [Tr. p. 116].

The affidavit was obtained by a representative of the National Labor Relations Board [Tr. p. 45, lines 1-24].

Buckner testified that he was told by the agent :

“ . . . that he was merely getting information so that when they referred this to Washington that there wouldn't be a kickback on the Local Board and that they would have sufficient grounds to deny the complaint.” [Tr. p. 46, lines 20-24].

and,

“ . . . he said that he had been down and talked to the stewards and, as far as he was concerned, there was no—I don't know how to express it—that there was no legitimate reason for filing an unfair labor practice charge.” [Tr. p. 47, lines 5-10].

There is no evidence that Buckner was advised of his constitutional rights to remain silent or to consult an attorney.

The affidavit contained what the Trial Examiner found to be admissions of illegal conduct. The Trial Examiner relied on the affidavit in his decision [TXD,

p. 1, 3d para. p. 2, lines 27-31; p. 2, lines 20-31]. The Board, on review, in turn considered "the entire record in the case" which necessarily included the affidavit [Tr. p. 23].

In about May of 1965, Buckner was contacted by another agent of the Board, at which time certain documents were delivered by Buckner to the agent. All the documents were not returned to Buckner at the hearing [Tr. pp. 246-248].

The Trial Examiner below concluded that Szczesniak had not filed verbal grievances, in violation of the contract, after March 3, 1965 [TXD, pp. 3-4 N. 7].

### III.

#### QUESTIONS PRESENTED.

1. Did the Board and the Trial Examiner err in refusing to defer to the decision of the grievance committee which determined that Szczesniak's discharge was proper?

2. Was the affidavit of Buckner properly admitted into evidence and considered by the Board and the Trial Examiner, though it was obtained by false and misleading statements tantamount to promises of a Board agent?

3. Was the affidavit of Buckner properly admitted into evidence and considered by the Board and the Trial Examiner, though it was obtained without advising Buckner of his constitutional right to remain silent and to have the advice of counsel?

4. Was petitioner herein denied due process of law or fair play in that the Board did not return all of



respondent's documents which were taken from respondent's President by a Board agent during the investigation of this matter?

#### IV.

#### SPECIFICATION OF ERRORS.

1. It was error for the Board and the Trial Examiner not to defer to the decision of the grievance committee and to conclude that the Board was not deprived of jurisdiction by such decision [TXD, p. 4].

2. It was error for the Board and the Trial Examiner to admit into evidence and to consider the affidavit of Buckner in reaching their decisions that petitioner herein was guilty of violations of 8(a)(1) and 8(a)(3), NLRA.

3. It was error for the Board to conclude that the principles of *Escobedo v. Illinois*, 378 U.S. 478 and following cases were inapplicable to this proceeding.

4. It was error for the Board to conclude that failure to return documents to petitioner herein did not require dismissal of the Complaint.

V.

ARGUMENT.

A. It Was Error for the Board and the Trial Examiner Not to Defer to the Decision of the Grievance Committee and to Conclude That the Board Was Not Deprived of Jurisdiction by Such Decision.

The Trial Examiner's statement of facts concerning the settlement of Szczesniak's grievance [TXD, p. 3, lines 42-51] is substantially correct, however the last sentence is misleading. It is under the term of the contract [Art. 8(4) G.C. Ex. 2] impossible to "unsuccessfully seek arbitration" [TXD, p. 3, lines 50-51].

The contract states that if the matter is not settled, it *shall* be referred to arbitration. It is absurd to suggest that one adversary must receive the permission of another to compel arbitration! To the contrary, both the Federal and California arbitration laws provide the machinery whereby the recalcitrant party can be compelled to arbitrate.

The company correctly believed that the Szczesniak grievance was settled. If Walker and the union did not think so, they could formally demand arbitration, then if the company refused, the union had every right to petition to compel arbitration. Failing to do either the arbitral process had ended, and the issue was settled.

The Board would have this court disregard in good measure the teachings of the Steelworker trilogy<sup>2</sup> and this court's own acknowledgement of the:

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<sup>2</sup>*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

“ . . . policy favoring speedy settlement of industrial disputes.”

*Association of Indus. Scientists v. Shell Dev. Co.*, 348 F. 2d 385, 389 (9th Cir. 1965).

The Board by refusing to defer, absent an actual arbitration hearing, to the grievance procedure is clearly not encouraging the speedy resolution of industrial disputes between the parties.

The Board on many occasions has recognized settlements of grievances in accordance with the contract. The landmark case is the *Spielberg* case, *Spielberg Mfg. Co.*, 112 NLRB No. 139, 36 LRRM 1152 (1955). That case held that the Board should acquiesce, in an exercise of its discretion, in an arbitration award where:

1. All parties had agreed to the arbitration award;
2. The proceedings were fair and regular; and
3. The settlement was not clearly repugnant to the purposes and policies of the Act.

From that modest beginning, the Board, with encouragement from the United States Supreme Court, see *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 (1960), has come to recognize that:

“If complete effectuation of the federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as ‘part and parcel of the collective bargaining process itself’ and voluntarily withhold its undoubted authority to adjudicate alleged unfair la-

bor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act."

*International Harvester Co.*, 138 NLRB No. 88, 51 LRRM 1155, 1156-57 (1962) *afd. sub nom Ramsey v. NLRB*, 327 F. 2d 784 (7th Cir. 1964) *cert. den.* 377 U.S. 1003, *reh. den.* 379 U.S. 874.

That case, too, involved an 8(a)(3) violation, and the arbitrator's award, though not free from all doubt, was recognized by the Board as controlling.

In *Modern Motor Express, Inc.*, 149 NLRB No. 147, 58 LRRM 1005 (1964), a case similar to ours, the employer terminated an employee for insubordination. The grievance committee upheld the employer's position. The employee had filed some three grievances in a period of five months. The Board, in rejecting the Trial Examiner's theory that the issue of grievance filing was eliminated by the Committee Chairman, apparently believed that issue was settled by the committee, and deferred to its resolution of the problem.

Of course, individual rights of an employee may be bargained away by the bargaining agent of that employer.

*Aeronautical Indus. Dist. Lodge v. Campbell*, 337 U.S. 521 (1948);

*Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953);

*Humphrey v. Moore*, 375 U.S. 335 (1964).

And where a grievance procedure is utilized to settle an issue, even where individual employee's right are concerned:

"The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." *Humphrey v. Moore, supra* at 351.

Where an award of a grievance committee is final and binding, as is the one in this case, it is not open to the courts to reweigh the merits of the grievance—nor should it be open to the Board. *Driver's Union v. Riss & Co.*, 372 U.S. 517 (1963).

Taken together we have:

1. A settlement agreement by representatives of the union and management that is final and binding under the express provisions of the contract due to acquiescence through considered non-action in processing the grievance further. The settlement is final and binding.

*Driver's Union v. Riss & Co., supra*;

*Humphrey v. Moore, supra*.

2. The union may bargain away individual rights in arriving at a contract, and it did so by agreeing to the grievance procedure in question. Mr. Szczesniak actually participated in the formation of such a procedure at the negotiation sessions. Thus the first *Spielberg* criterion is met; all parties agreed to the grievance procedure in question.

*Spielberg Mfg. Co., supra*;

*Ford Motor Co. v. Huffman, supra*;

*Humphrey v. Moore, supra*, see esp. concurring opinion, Goldberg, J., at 351-359.

3. The proceedings were substantially as required by the contract.

a. A written grievance was filed;

b. Whereas the Company did not give a written answer to the grievance, a discussion was held "in an effort to resolve the dispute." The union, as represented by the stewards, the Workers Committee, telephone calls to the International Representative and discussion, did agree to a resolution of the grievance.

There is no showing that the proceedings were not fair, nor "regular". Thus the second *Spielberg* criterion is met in a realistic, work-a-day way of doing things. But even more important, the procedure for settling disputes, bargained for and chosen by the parties, settled a dispute, and did just what it was intended to do with a minimum amount of time lost from production of goods and services. It must then be recognized.

*Driver's Union v. Riss & Co., supra;*

*United Steelworkers of America v. American Mfg. Co., supra.*

4. The decision arrived at by the union and management was clearly not repugnant to the purposes and policies of the National Labor Relations Act. Initially, the purposes and policies of the Act are to encourage private settlements of labor disputes. If the Steelworkers trilogy tells us nothing else, it does tell us that; and secondly, the action taken by management was thought justified by the workers committee as pointed out above. Thus, the third criterion of the *Spielberg* decision is met.



Petitioner recognizes that the Board is not required by statutory law to defer to a grievance procedure settlement whether an arbitrator has heard the case or not, however the case law greatly favoring internal resolution of disputes which has developed since *Spielberg* at least strongly suggests that it is an abuse of discretion not to defer under the circumstances of this case.

It is highly doubtful if the Board should substitute its judgment for that of the parties involved. Where industrial harmony is maintained through proceedings conforming with the collective bargaining contract even before the burden of an arbitration proceeding, it seems that the ideal of ready communication between management and labor has been reached. We join with the Board in saying that the Board should not substitute:

“ . . . the Board’s judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, ‘as part and parcel of the collective bargaining process.’ ” (*International Harvester Co.*, *supra* at 1158).

**B. It Was Error for the Board and the Trial Examiner to Admit Into Evidence and to Consider the Affidavit of Buckner in Reaching Their Decisions That Petitioner Herein Was Guilty of Violations of 8(a)(1) and 8(a)(3), NLRA.**

**1. The General Rules.**

It can not now be doubted that evidence obtained in violation of the constitutional rights of the accused may not be used against him in any criminal proceeding.

*Fahy v. Connecticut*, 375 U.S. 85 (1963) [State Courts];

*Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963) [Federal Courts—Administrative proceedings];  
*Rogers v. Richmond*, 365 U.S. 534 (1961) [State Courts];  
*Malinski v. New York*, 324 U.S. 401 (1945) [State Courts];  
*Ziang Sung Wan v. U.S.*, 266 U.S. 1 (1924) [Federal Courts].

Indeed, in cases where a confession obtained in violation of the convicted person's constitutional rights is admitted into evidence, the conviction may not stand.

"If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. *Ashcraft v. Tennessee*, supra (322 US p 154, 88 L ed 1199, 64 S Ct 921). And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. *Lyons v. Oklahoma*, 322 US 596, 597 88 L ed 1481, 1483, 64 S Ct 1208."

*Malinski v. New York*, supra at 404.

2. **An NLRB Proceeding Is a Quasi-Criminal Proceeding to the Extent That Basic Constitutional Rights May Not Be Denied the "Accused".**

The first major realization on the part of the courts that NLRB proceedings should be subject to certain criminal rules of procedure and constitutional prohibitions appears in *NLRB v. Adhesive Prod. Corp.*, 258 F. 2d 403 (2d Cir. 1958).

In that case the *Jencks*<sup>3</sup> rule (requiring the production for the use of the accused of all prior statements of witnesses received and used by the Federal Government in criminal cases) was applied to Board hearings.

“In our opinion, logic compels the conclusion that these rules are applicable to an administrative hearing.”

*NLRB v. Adhesive Prod. Corp.*, *supra* at 408.

See also:

*Communist Party of United States v. Subversive Act. Con. Bd.*, 254 F. 2d 314 (D.C. 1958).

Misconduct at the administrative investigation level may also cause an inculpatory statement to be inadmissible in a resulting criminal prosecution. As was stated by the court in reviewing a Federal tax case:

“It is of course a constitutional principle of long standing that the prosecution ‘must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.’ *Rogers v. Richmond*, 365 US 534, 541, 5 L ed 2d 760, 766, 81 S Ct 735. We have no hesitation in saying that this principle also reaches evidence of guilt *induced from a person under a governmental promise of immunity*, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment.”

\* \* \*

Petitioners' position is not like that of a person, accused or suspected of crime, to whom a police-

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<sup>3</sup>*Jencks v. U.S.*, 353 U.S. 677 (1957).

man, a prosecutor, or an investigating agency has made a promise of immunity or leniency in return for a statement. *In those circumstances an inculpatory statement would be the product of inducement, and thus not an act of free will.*"

*Shotwell Mfg. Co. v. United States*, *supra* at 347-8 (Emphasis added).

Similar results have been reached by courts where a governmental agent has illegally obtained evidence and the evidence is admitted in a civil, but quasi-criminal proceeding.

In *Rogers v. United States*, 97 F. 2d 691 (1st Cir. 1938), the government sued in a civil action for certain duties on imported liquors. The liquor had been seized as a result of an illegal search. The First Circuit held:

"... we think that a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is likewise rendered invalid."  
97 F. 2d at 692.

For a similar result, see,

*Ex parte Jackson*, 263 Fed. 110 (D.C. Mont. 1920) app. dismissed 267 Fed. 1022 (9th Cir. 1920).

The Supreme Court has stated, in reviewing proceedings incidental to a disbarment proceeding:

"The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary

to convict him . . . ' United States v. White, 322 US 694, 698, 88 L ed 1542, 1546 64 S Ct 1248, 152 ALR 1202."

*Spevack v. Klein*, .... U.S. ...., 17 L. ed. 2d 574, 578, 87 S. Ct. ....(1967).

The *Spevack* case was, to be sure, a case where the petitioner *refused* to produce certain records or appear at an inquiry. The fact remains, however, that a disbarment proceeding is not a criminal proceeding. And as surely as the investigating authorities could not force such compliance, neither could they have used the evidence if obtained as a result of compulsion or promises.

*Malinski v. New York*, *supra*;

*Fahy v. Connecticut*, *supra*;

*Rogers v. United States*, *supra*.

Applied to our case, we have an agent of the federal government who by making false and misleading statements and promises caused an inculpatory statement to be made by the accused.<sup>4</sup>

There is no question that the statements made by the agent of the federal government were tantamount to promises that the charge would not be prosecuted against Buckner.

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<sup>4</sup>Buckner's testimony concerning the statements made by the Board agent was not questioned by the government, nor was the investigating agent produced though he was an agent of Region 21, which offices are in the same building as the hearing room where the hearing before the Trial Examiner was held. In the absence of any rebutting testimony, Buckner's testimony must be accepted. Cal.Evid. Code §§ 412, 413.

See *National Maritime Union of America v. NLRB*, 353 F. 2d 521, 522 (2nd Cir. 1965). This court may take judicial notice of the location of Region 21. Cal.Evid. Code §§ 451(f), 452(g)(h); *Greeson v. Imperial Irr. Dist.*, 59 F. 2d 529, 531 (9th Cir. 1932) *Salinas Valley Broadcasting Corp. v. NLRB*, 334 F. 2d 604 (9th Cir. 1964).



See:

*Shotwell Mfg. Co. v. United States, supra;*

*United States v. Denno*, 259 F. Supp. 784  
(S.D. N.Y. 1966).

In such a case this court should set aside and refuse to enforce the Board's order on the ground that Buckner's statement was improperly admitted and considered by the Board and the Trial Examiner.

### 3. The Rationale Behind the Proposed Rule.

"Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. See *Chambers v. Florida*, 309 US 227, 84 L ed 716, 60 S Ct 472; *Lisenba v. California*, 314 US 219, 236, 86 L ed 166, 179, 62 S Ct 280; *Rochin v. California*, 342 US 165, 172-174, 96 L ed 183, 190, 191, 72 S Ct 205, 25 ALR 2d 1396; *Spano v. New York*, 360 US 315, 320, 321, 3 L ed 2d 1265, 1269, 1270, 79 S Ct 1202; *Blackburn v. Alabama*, 361 US 199, 206, 207, 4 L ed 2d 242, 247, 248, 80 S Ct 274. And see *Watts v. Indiana*, 338 US 49, 54, 55, 93 L ed 1801, 1806,



69 S Ct 1347, 1357. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.”

*Rogers v. Richmond*, 365 U.S. 534, 540-1 (1961).

As recognized above by the Supreme Court, the only sure way to insure against such investigating practices as are present in this case is to reverse the conviction, i.e., refuse to enforce the Board's order.

Just so long as such practices do not cause such denials of enforcement then just so long will they continue.

The Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), in enforcing the Federal exclusionary rule against the States regarding illegally seized evidence stated:

“This Court has ever since required of federal law officers a strict adherence to that command

which this Court has held to be a clear, specific and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to ‘a form of words’. *Holmes, J., Silverthorne Lumber Co. v. United States*, 351 US 385, 392, 64 L ed 319, 321, 40 S Ct 182, 24 ALR 1426 (1920). It meant, quite simply, that ‘conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . .’ *Weeks v. United States*, *supra* (232 US at 392), and that such evidence ‘shall not be used at all.’ *Silverthorne Lumber Co. v. United States*, *supra*, (251 U.S. at 392).” (367 U.S. at 648.)

In that case, the court recognized that the only way to stop such reprehensible practices was to deny the fruits of the practice.

The practice is no less reprehensible when done by one agent of the federal or state government or another. The penalty should be no less severe.

Nor may it reasonably be argued that in proceedings where immense amounts of money may have to be paid by the victim of the illegal practice that he may not suffer the penalties of a convicted criminal.

Nor may it any longer be reasonably argued that basic requirements of due process and fair play do not apply to Board hearings.

“This court would unhesitatingly refuse to enforce an order of an administrative board or agency, if issued pursuant to an unfair hearing or without

due process of law. The requirement of fair trial and fair play is binding on administrative agencies as well as on courts."

*NLRB v. Newberry Lumber & Chemical Co.*,  
123 F. 2d 831, 838 (6th Cir. 1941);

See:

*Ohio Bell Telephone Co. v. P.V.C. of Ohio*,  
301 U.S. 292 (1937).

The courts, and this court in particular, have given the Board wide discretion in their determinations of both fact, *NLRB v. Deutsch Co.*, 265 F. 2d 473 (9th Cir. 1959) cert. den. 361 U.S. 963; *Salinas Valley Broadcasting Corp. v. NLRB*, 334 F. 2d 604 (9th Cir. 1964) and law, *NLRB v. Retail Clerks Local 648*, 243 F. 2d 777 (9th Cir. 1956).

The precise question before the Court now, however, is what weight to a disregard of constitutional rights?

Petitioner herein submits that the only answer is "no weight". And further submits that this court must deny enforcement of the Board's order where:

1. The constitutional violation is clear and uncontradicted;
2. The only way such violations may be prevented is to reject the evidence or reverse the decision where the evidence was relied upon; and
3. The decisions and order do rely on the evidence.

**C. It Was Error for the Board to Conclude That the Principles of *Escobedo v. Illinois*, 378 U.S. 478 and Following Cases Were Inapplicable to This Proceeding.**

*Escobedo*, of course, no longer represents the full extent of the law in matters of interrogation without advice of counsel. Nor, does petitioner herein gainsay that *Miranda* represents the ultimate or even penultimate word:

But *Miranda* does hold:

“Our holding be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.<sup>4</sup> As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”

*Miranda v. Arizona*, 384 U.S. 436, 444 (1966).  
[Footnote 4 omitted].

The privilege against self-incrimination is something more than just a rule to keep the police in line. It is at the very base of our society.

Nor is the privilege to be strictly construed:

“In this Court, the privilege has consistently been accorded a liberal construction.”

384 U.S. at 461.

In the instant case the evidence is without contradiction that Buckner was not advised of his constitutional rights as defined in the *Miranda* case.

The Board only once has considered with anything approaching depth the *Escobedo-Miranda* problem.<sup>5</sup> In *Mary Anne Bakeries*, 164 NLRB No. 30, 65 LRRM 1071 (1967), the Board overruled the Trial Examiner, who indeed did feel that *Escobedo* should apply. The Board's reasoning was twofold:

1. There is no custodial interrogation;
- and
2. Unfair labor practice hearings are not criminal proceedings.

*Miranda* should not be read to apply to only the classic “custodial interrogations”. *Miranda*, as shown above, stands for the proposition, above all else, that the government must prove its case without trickery, deception or advantage caused by absence of counsel for the one interrogated.

Nor, as pointed out in Part B of this Argument does the constitution limit itself to classic criminal proceedings, but rather extends to quasi-criminal administrative hearings and civil actions.

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<sup>5</sup>The Board has, of course, had other such cases, *e.g.*, *Crown Imports Co., Inc.*, 163 NLRB No. 4, 64 LRRM 1251 (1967) and this instant case.

The reasons of the Board are not valid. The questions remain:

1. Why should a governmental agency with the power to award huge monetary penalties, and force immense business decisions<sup>6</sup> *not* be required to honor the basic constitutional rights of the citizens?

2. By what stretch of the imagination should a person not be entitled to the due process of law and his constitutional rights simply because a governmental enforcement proceeding is not labeled "Criminal"?

Petitioner submits that there is no justification for not requiring the fundamentals of due process and fair play, as contained in the Constitution of the United States and defined by the United States Supreme Court, at all stages of Board proceedings, from investigation to Board review.

**D. The Order Should Not Be Enforced Because the General Counsel Failed to Produce Documents Taken From Respondent's Possession.**

The record is clear and without contradiction that Mr. Goode, an agent of the National Labor Relations Board in the course of his investigation took from respondent a file of documents pertaining to the subject of grievances [Tr. pp. 247-248]. They were in the handwriting of Szczesniak, with notations by Loy [Tr. pp. 247-248].

Since one of the key issues in the case, and one on which the Trial Examiner found adversely to respondent was whether Szczesniak filed "verbal" grievances

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<sup>6</sup>See *c.g.*, *Darlington Mfg. Co.*, 139 NLRB No. 23, 51 LRRM 1278 (1962).



after the execution of the current collective bargaining agreement, these documents were highly relevant and material to respondent's defense of the case [See TXD, p. 4 Note 7].

The purported papers likely would have changed that finding, and given such a change, it is presently impossible to know whether the Trial Examiner would not have found that the oral filing of grievances in violation of the contract and excessive absenteeism were the only reasons for the discharge.

As Judge Sobeloff in *Barbee v. Warden, Maryland Penitentiary*, 331 F. 2d 842, 847 (4th Cir. 1964) stated:

"In the present case, where evidence was withheld by the police which had a direct bearing upon and could reasonably have weakened or overcome testimony adverse to the defendant, we will not indulge in the speculation that the undisclosed evidence might not have influenced the fact finder.<sup>13</sup> 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' 375 U.S. at 86-87, 84 S Ct 230, 11 L ed 2d 171. Involved is a question of fundamental fairness rising to the level of constitutional due process which cannot be brushed aside as a mere error in an evidentiary ruling." (Footnote 13 omitted).

All of the documents delivered to the Board agent were not returned to respondent by the General Counsel [Tr. pp. 247-248]. The General Counsel did stipulate that Mr. Goode, the Board agent, if called as a witness, would testify that he had no recollection about the documents at all [Tr. pp. 143-146].

To allow the General Counsel to deprive a respondent of documents which would materially aid in the preparation of his defense and likely would change the Trial Examiner's decision creates an intolerable situation.

The failure of the General Counsel to deliver documents to respondent to which respondent is entitled has been held to be erroneous in *General Engineering, Inc. v. NLRB*, 131 F. 2d 367 (9th Cir. 1965).

The Board is authorized:

“ . . . to depart from rules of evidence applicable in the federal district courts to the extent that this is necessary because of the peculiar characteristics of administrative hearings. But as the Fifth Circuit held in *N.L.R.B. v. Capitol Fish Co.*, 5 Cir., 294 F.2d 868, 872, no special characteristics of an administrative hearing justify the exclusion of evidence or the revocation of subpoenas which it would be error to exclude or revoke in a federal district court trial.”

341 F. 2d at 374.

The negligent or otherwise unexplained failure of a prosecutor to deliver to a defendant upon motion, documents taken from him during the investigation of a criminal case has been held grounds for dismissing a criminal complaint or indictment or granting of a new trial. *Ingram v. Peyton*, 367 F. 2d 933, 936 (4th Cir. 1966); *United States v. Consolidated Laundries Corporation*, 291 F. 2d 563 (2d Cir. 1961); *United States v. Heath*, 260 F. 2d 623 (9th Cir. 1958).

As this court stated in the *Heath* case:

“It has been wisely said that the agents of the government should not act an ignoble part. No more ignoble action could be imagined than for them to obtain these documents from the defendant voluntarily, give no receipt to prove their existence and their possession, suffer the records to be destroyed and then claim the right to prosecute when, by their action, his defense is impaired, if not destroyed. But it is urged the action of the trial court leaves the room open for connivance and fraud. It may well be. However, that is no ground for failure to accord the accused rights expressly given by statute or rule. Although the possibility of deception may exist, the public must trust that the trial judges will not be misled.” (260 F. 2d at 629.)

The only case found which considers the *Heath-Consolidated Laundries Corp.*, rule in a purely civil action<sup>7</sup> is *Allegheny Corp. v. Kirby*, 333 F. 2d 327 (2d Cir. 1964), *en banc* 340 F. 2d 311 (1965) Appeal dismissed 384 U.S. 28 (1960), *reh. den.* 384 U.S. 967.

In that case the three judge Circuit Court panel split on the issue in three different directions.

Judge Moore concluded that the non-disclosed documents merely supplied additional evidence of an already well-established fact, 333 F. 2d at 334.

Judge Kaufman concluded that the federal courts should not apply the rule in state civil actions, basing his decision on “. . . considerations of *res judicata* and comity . . .,” 333 F.2d at 338.

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<sup>7</sup>For reasons stated above, we submit that a Board proceeding is at least a quasi-criminal proceeding.

Judge Friendly, on the other hand, concluded that:

“The test should be more nearly that applied by us in *United States v. Consolidated Laundries*, supra, 291 F.2d 563,<sup>5</sup> or by the New York courts in *Matter of Lautz*, 128 Misc. 710, 220 N.Y.S. 782 (Surr. Ct., Erie Co. 1927); and *Boston & Main R. R. v. Delaware & Hudson Co.*, 238 App. Div. 191, 196, 264 N.Y.S. 470, 477 (3d Dept. 1933)—whether there is any fair basis for thinking the undisclosed evidence *might have changed* the result. Here the evidence could well have done that.” (Footnote 5 omitted).

In an *en banc* hearing, cryptically reported at 340 F. 2d 311 (2d Cir. 1965), the eight participating judge split 4-4. Certiorari was granted, 381 U.S. 933 (1965), and then the appeal dismissed 384 U.S. 28, with three justices dissenting and two not participating.

The history of that case hardly suggests that the issue is a simple one, particularly where in the instant case we have:

1. A federal agency;
2. With the power to conduct extensive investigations; and
3. A fair probability that the evidence would have changed the result;
4. Had it not been lost or carelessly misplaced by the government; and
5. The evidence came from and was part of the records of the individual defendant in the Board proceeding.

VI.

CONCLUSION.

This Court should not enforce the Board's order for the reasons stated above. Alternatively, if this court holds that the Board acted properly in not deferring the grievance committee decision, but that the Buckner affidavit was improperly admitted and considered, this court could remand this case to the Board for a new hearing.

Dated: August 30, 1967.

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### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID A. MADDUX



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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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F.J. BUCKNER CORPORATION, d/b/a  
UNITED ENGINEERING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

---

ON PETITION TO REVIEW AND CROSS-PETITION FOR  
ENFORCEMENT OF AN ORDER OF THE NATIONAL  
LABOR RELATIONS BOARD

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 21,786

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F.J. BUCKNER CORPORATION, d/b/a  
UNITED ENGINEERING COMPANY, PETITIONER

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NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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ON PETITION TO REVIEW AND CROSS-PETITION FOR  
ENFORCEMENT OF AN ORDER OF THE NATIONAL  
LABOR RELATIONS BOARD

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

---

JURISDICTION

This case is before the Court upon petition of F.J. Buckner Corporation, d/b/a United Engineering Company (hereafter "petitioner" or "Company"), to review and set aside, and on cross-petition by the National Labor Relations Board to enforce, an order of the Board reported at 163 NLRB No. 7. The order, which issued on April 20, 1967, followed proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.) The Company maintains its principal place of business within this judicial circuit in Compton, California, and this Court has jurisdiction of the proceeding under Section 10(e) of the Act.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(3) and



because he engaged in activities protected by Section 7 of the Act.

<sup>1/</sup>  
(R. 23-24).

Petitioner employs about 200 individuals (R. 13; Tr. 52) and performs maintenance services for oil and chemical companies (R. 12-13; Tr. 234). Szczesniak worked for petitioner as a laborer and mechanic's helper from May 1956 until March 20, 1965 (R. 13; Tr. 118). During 1964 and 1965 Szczesniak held a number of positions with the Union,<sup>2/</sup> including unit chairman, negotiating committee chairman, member of the negotiating committee, member of the policy board, and steward (ibid.).

The duties of the steward were, as Szczesniak explained, "to see that there was a correct interpretation and application of the contract; to assist men in problems or any grievances they might have; and to investigate . . . /grievances/ to see if there were any basis for them" (Tr. 119). In fulfilling these obligations, Szczesniak had frequent conversations with Leonard Loy, petitioner's plant manager (R. 14; Tr. 23, 255), about the employees' complaints (R. 14; Tr. 170-171, 275-279). Indeed, in the Company's opinion, the steward did his job too conscientiously. Thus, at a bargaining meeting to negotiate a new contract held in early 1965, F.J. Buckner, petitioner's president

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<sup>1/</sup> References designated "R" are to Volume I of the record reproduced according to Rule 10 of the Rules of this Court. "Tr." references are to the reporter's transcript of testimony reproduced in Volume II of the record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

<sup>2/</sup> Oil, Chemical, and Atomic Workers International Union, Local 1-128, AFL-CIO, Long Beach Local No. 1-128, OCAWIU, AFL-CIO.





(R. 13; Tr. 22), complained to Szczesniak that the Company was being harassed with grievances and that he "intended to put a stop to it" (R. 14; Tr. 42). Further, Buckner accused Szczesniak of "going around the plant and going to people's homes at nights" (R. 14; Tr. 238) and requesting the employees to file grievances "where grievances actually did not exist" (R. 14; Tr. 43).<sup>3/</sup>

The 1965 contract negotiations resulted in a new agreement effective March 3, 1965, providing, inter alia, that grievances shall be submitted "in written form" (G.C. Exh. 2, p. 4 Article VII, para. 1).<sup>4/</sup> Between March 3 and 19, Szczesniak had several meetings with Loy in which the employee sought information to determine whether certain employee complaints warranted the filing of written grievances (R. 13,

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3/ Szczesniak gave uncontradicted testimony that he never solicited a employee to file a grievance, and both Buckner and Loy admitted that they had no first-hand knowledge to support their accusation (Tr. 173, 250, 281).

4/ The agreement also provided, for the first time, that the Union stewards "when requested by an employee may assist said employee in discussing with supervision any question pertaining to working conditions including the processing of a grievance. Such discussion will be at such time and place as not to interfere with efficient maintenance of the work. The Steward must secure permission from his Foreman to leave his work assignment and must report back to his Foreman upon returning to his work. Stewards will act in such a manner as to take the minimum time away from their work" (G.C. Exh. 2, p. 4, Article III).



n. 4, R. 15, n. 7; Tr. 120-129, 172). <sup>5/</sup> Buckner, however, accused Szczesniak of still filing grievances in verbal form and stated that the Company was "sick and tired of it" (Tr. 243).

On March 18, Szczesniak, who had previously been rebuked for being absent without notifying the Company (Tr. 237, 269-270), did not appear for his job on the night shift (Tr. 270-271). Loy, who had not been advised by Szczesniak that he would be absent, telephoned Buckner and informed him of what had occurred (Tr. 271). The next day, March 19, Buckner decided to discharge Szczesniak (Tr. 24-25, 274). While this decision was based in part on the fact that Szczesniak had once again been absent without calling in, Buckner testified that his decision was also motivated in part by the manner in which Szczesniak solicited and pressed grievances (Tr. 34-35, 42-43, 53-54, 56). Buckner believed that Szczesniak was soliciting unmeritorious grievances from employees at their homes and on the job, and that he was interfering with the work of office personnel in presenting them (Tr. 42-43, 49, 238).

After deciding to discharge Szczesniak, Buckner called a Mr. Thornberry, the Union's International Representative, and told him Szczesniak was being discharged because of too many unexplained absences (Tr. 244-245). Thornberry approved of the action

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5/ For example, on the 16th, Szczesniak informed Loy that the men were complaining about the Company's rehiring practices and he inquired if petitioner "was adhering to . . . the preferential hiring list as per our contract" (Tr. 122). And on March 19th, Szczesniak requested that Loy check the time cards of two employees who had complained they had received only "laborers' pay for doing helpers' work" (Tr. 128).



(Tr. 245 ). Buckner then called Loy and told him to fire Szczesniak (Tr. 24-25, 274). The next day, March 20, Loy discharged the employee, telling him that he was being terminated for "absenteeism without valid excuses or reasons and that his methods of bringing grievances were also in it" (Tr. 275).

On March 25, Szczesniak filed a grievance alleging that the discharge was unjustified and in violation of the contract (R. 14; Tr. 168, Resp. Exh. 1). On April 2, two members of the three-man Workmen's Committee were called in by Loy to discuss the discharge (R. 14; Tr. 111, 206, 213-216, 221-222, 223-225). Neither the Union's staff representative, whom the contract requires also be present when the employer meets with the Workmen's Committee under the grievance procedure, nor the grievant himself, was notified of the meeting or present at it (R. 14; Tr. 85-87, 222, 225, 232, 292).<sup>6/</sup> After a short

6/ The grievance procedure established by the contract states, in relevant part (G.C. Exh. 2, pp. 4-5):

"Employees of the Union shall have the right to present grievances involving the interpretation and application of this Agreement and any dispute arising hereunder. Such disputes or grievances shall be handled in the following manner:

1. The employee and/or a Steward shall take the matter up in written form with the designated representative of the Company on the job site where the grievance occurs, within five (5) working days, after his knowledge of the incident which cause the grievance.

2. The Company will give its written answer within five (5) working days, then the Union and the committee shall meet

(Continued)





discussion, in which Szczesniak's absences and grievance activities were mentioned, the two committeemen agreed that the Company had good and sufficient cause to terminate Szczesniak (R. 14; Tr. 222-225, 231, 232, Resp. Exhs. 5, 6). Two to four weeks later, James Walker, the Union's staff representative, spoke to Buckner and Loy about Szczesniak's discharge (Tr. 64). They told him the employee had been terminated because of his absences and because "he had been agitating the employees on the job; that he had been going to people's homes and soliciting grievances; and he also mentioned the problem that they had where Mr. Szczesniak had asked some laborers why they didn't get a helper's job in the insulation department; and anyway, because of this, Mr. Loy said that they had lost that work" (Tr. 65). Walker subsequently called Buckner and told him the Union wanted to submit Szczesniak's discharge to arbitration (R. 14; Tr. 93-95). Buckner, however, refused on the ground that the matter was closed because the Workmen's Committee had agreed with the Company (ibid.). Walker replied that the matter was not settled as far as the Union was concerned, but nothing further was done to compel the Company to submit the matter to arbitration (Tr. 95).

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6/ (Continued) with the Company within five (5) working days in an effort to resolve the dispute.

3. \* \* \*

4. If the dispute is not settled in Step No. 2 above, the matter shall be reviewed by a representative of the Union and Company within five (5) days who shall, failing to settle the grievance between themselves, refer the dispute to the American Arbitration Association in writing within ten (10) days to be timely, for adjudication . . . ."



## II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing, the Board, in agreement with the Trial Examiner, found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging Szczesniak, in significant part, because of his role in handling and processing employee grievances, an activity protected by Section 7 of the Act. The Board ordered the Company to cease and desist from the unfair labor practices found or in any other manner interfering with, restraining or coercing its employees in the exercise of their statutory rights. Affirmatively, the Board ordered petitioner to reinstate Szczesniak and compensate him for any monetary loss suffered, and to post appropriate notices.

### ARGUMENT

#### I. INTRODUCTION

Before this Court, the Company does not challenge the Board's finding that Szczesniak's discharge was motivated in significant part by his role in handling and processing grievances under the collective bargaining agreement. Indeed, as shown in the counterstatement of the case, Buckner and Loy admitted as much at the hearing. Nor does the Company challenge the Board's conclusion that a discharge so motivated violated Section 8(a)(3) and (1) of the Act. This proposition is settled law. See, e.g., Shattuck Denn Mining Corp. v. N.L.R.B., 362 F. 2d 466, 467-470 (C.A. 9); Hawkins v. N.L.R.B., 358 F. 2d 281 (C.A. 7); N.L.R.B. v. Thor Power Tool Co., 351 F. 2d 584 (C.A. 7); N.L.R.B. v. Symons Mfg. Co., 328 F. 2d 835 (C.A. 7); N.L.R.B. v. Bowman Transportation, Inc., 314 F. 2d 497 (C.A. 5). Cf., Morrison-Knudsen Co. v. N.L.R.B., 358 F. 2d 411 (C.A. 9); N.L.R.B. v. Western Meat Packers, Inc., 368 F. 2d



65, 68, 70-71(C.A. 10); Socony Mobil Oil Co. v. N.L.R.B., 357 F. 2d 662 (C.A. 2).<sup>7/</sup> Rather, the Company raises a number of procedural defenses upon which it seeks to prevail without regard to the merits of the case. We submit, however, that the arguments asserted by petitioner here are without substance, and that the Board is entitled to have its order enforced in full.

II. THE BOARD PROPERLY DECLINED TO  
DEFER TO THE ALLEGED PRIVATE  
SETTLEMENT OF SZCZESNIAK'S GRIEVANCE

Petitioner argues (Br. pp. 6-11) that the Board was deprived of jurisdiction to entertain the instant unfair labor practice charge -- or at least abused its discretion in doing so -- because the grievance which Szczesniak filed over his discharge was allegedly settled between the Company and the Union at Step 2 of the contractual grievance procedure. However, Section 10(a) of the Act states that the Board's power to remedy and prevent unfair labor practices is unaffected "by any means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." It is well settled that, by virtue of this provision, "agreements between private parties cannot

<sup>7/</sup> It is immaterial that Szczesniak's discharge was also partly motivated by reasons unrelated to his protected activity, so long as one motive was for an illegal object. Socony Mobil Oil Co. v. N.L.R.B., supra, 357 F. 2d at 663; N.L.R.B. v. Barberton Plastics Products, Inc., 354 F. 2d 66, 68 (C.A. 6); N.L.R.B. v. D'Armigene, Inc., 353 F. 2d 406, 409 (C.A. 2); N.L.R.B. v. Great Eastern Color Lithographic Corp., 309 F. 2d 352, 355 (C.A. 2), cert. denied 373 U.S. 950.





restrict the jurisdiction of the Board. . . .The Board may exercise its jurisdiction in any case of an unfair labor practice when in its discretion its interference is necessary to protect the public rights defined in the Act." N.L.R.B. v. Walt Disney Production, 146 F. 2d 44, 48, (C.A. 9), cert. denied 324 U.S. 877. Accord: N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 436; Carey v. Westinghouse Electric Corp., 375 U.S. 261, 270-271; N.L.R.B. v. Tanner Motor Livery, Ltd., 349 F. 2d 1, (C.A. 9); N.L.R.B. v. Auburn Rubber Co., Inc., -- F. 2d -- (C.A. 10), 56 LRRM 2129, 2130; N.L.R.B. v. Thor Power Tool Co., 351 F. 2d 584, 587 (C.A. 7); Lodge 743, IAM v. United Aircraft Corp., 337 F. 2d 5, 8-9 (C.A. 2), and cases cited therein, cert. denied 380 U.S. 908.<sup>8/</sup> Thus, the alleged settlement of Szczesniak's grievance between the company and the union did not, as a matter of law, deprive the Board of jurisdiction in this case.

It is true that, in the exercise of its discretion, the Board has adopted the policy of giving "hospitable acceptance to the

<sup>8/</sup> In its brief, p. 8, petitioner asserts that "individual rights of an employee may be bargained away by the bargaining agent of that employer [sic]." While that proposition might be true with regard to rights arising under a collective bargaining agreement, no court has held that a union may bargain away the statutory right of the employees it represents to be free of conduct violative of Section 8(a)(1),(2),(3) and (4) of the National Labor Relations Act. See Lodge 743, IAM v. United Aircraft Corp., supra, 337 F. 2d at 10.



the arbitral process," by "voluntarily withhold<sup>ing</sup> its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." International Harvester Co., 138 NLRB 923, 927, aff'd sub nom. Ramsey v. N.L.R.B., 327 F. 2d 784 (C.A. 7), cert. denied 377 U.S. 1003, cited and quoted with approval in Carey v. Westinghouse Electric Corp., 375 U.S. 261, 270-271. This policy, however, is clearly inapplicable here for the simple reason that there was no arbitration. There was no determination of the validity of Szczesniak's discharge by an impartial third party -- or even by a viable bipartite panel<sup>9/</sup> -- after a full hearing in which the dischargee was given an opportunity to present his case and challenge the employer's. There was no confrontation between the accuser and the accused, no examination and cross-examination, no calling of witnesses -- in short, nothing to assure that all the relevant facts were brought out and made available for consideration by a fair-minded bench.

Rather, so far as the record shows, there was merely a meeting between the Company and two members of the Workmen's Committee, at which the employer's representative prevailed upon the two employees to agree that the grievant was discharged for cause. Szczesniak did not know of the meeting and so was not there, and the record is barren of any details about what went on. Even assuming that this was a

<sup>9/</sup> See Roadway Express, Inc., 145 NLRB 513, 514-515.



properly conducted meeting under Step 2 of the grievance procedure,<sup>10/</sup> it hardly satisfies the Board's requirements of procedural fairness which would warrant deference to the result. As the Board said with regard to a similar situation in Pontiac Motors Division, General Motors Corp., 132 NLRB 413, 415:

"No impartial arbitrator has ruled in this case. A grievance, carried through Step 2 of a grievance procedure, is hardly a substitute for an arbitration proceeding. The Board may not abdicate its exclusive jurisdiction over unfair labor practices merely because an unlawfully discharged employee has attempted to get his job back by dealing directly with the offending employer."

See also Electric Motors and Specialties, Inc., 149 NLRB 131, 137.

Accord: N.L.R.B. v. Tanner Motor Livery, Ltd., 349 F. 2d 1, 3, n. 1 (C.A. 9), affirming on this point 148 NLRB 1402, 1413. Nor is it significant that the Union did not take steps to arbitrate Szczesniak's discharge when Staff Representative Walker repudiated the Step 2 settlement. There is no requirement that the Board "should have

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<sup>10/</sup> The contract provides that at Step 2, the Company shall meet with "the Union and the [workmen's] committee" (G.C. Exh. 2, p. 4).

Walker, the Union's staff representative who serviced this contract, testified without contradiction that this meant that he and the three-man employee committee together would meet with the Company (Tr. 70-71, 85-87). It is undisputed that neither Walker nor the third member of the employee committee was notified of, or present at, the purported Step 2 meeting at which Szczesniak's grievance was "settled."





withheld its processes because the charging party . . . had invoked and then abandoned the grievance procedures provided in the collective bargaining agreement between the union and the company." N.L.R.B. v. Thor Power Tool Co., 351 F. 2d 581, 587 (C.A. 7). As this Court said in N.L.R.B. v. Walt Disney Productions, supra, 146 F. 2d at 49:

"No inference can be drawn . . . that where an unfair labor practice exists, the grievance and arbitration procedures established in a prevailing collective bargaining agreement must be exhausted before the N.L.R.B. will accept jurisdiction over the matter."

Accord: N.L.R.B. v. Huttig Sash & Door Co., Inc., 377 F. 2d 964, 970 (C.A. 8).

III. NO PREJUDICIAL ERROR WAS COMMITTED  
BY THE ADMISSION INTO EVIDENCE OF  
BUCKNER'S PRE-HEARING STATEMENT

The record shows that in the course of the investigation into the unfair labor practice charge filed by the Union (G.C. Exh. 1(a)), an agent from the Board's Regional Office, Field Attorney William F. Spannier III, obtained a written sworn statement from F.J. Buckner, petitioner's president and sole stockholder (G.C. Exh. 4). Buckner was interviewed in his office, and he detailed to Spannier the reasons for discharging Szczesniak (Tr. 44-48). The Board agent wrote out the statement in longhand, but Buckner asked him to submit it in typewritten form before he (Buckner) would sign it (Tr. 45). Spannier returned with typed copies of the statement "at some later time," and Buckner then signed it (ibid.).



At the time of the interview, Spannier told Buckner "that he was merely getting information so that when they [the Regional Office] referred this to Washington . . . there wouldn't be a kickback on the Local Board and . . . they would have sufficient grounds to deny the complaint" (Tr. 46). The Board agent also told Buckner that he (Spannier) had "talked to the Union and had talked to the stewards and, as far as he was concerned, there was no . . . legitimate reason for filing an unfair labor practice charge" (Tr. 47).

On the basis of these facts, petitioner argues that the Court should set aside and refuse to enforce the Board's order because the Board agent, "by making false and misleading statements and promises [and] caused an inculpatory statement to be made by the accused [i.e., Buckner]" in violation of his Fifth Amendment rights (Br. p. 15); and because the Board agent secured Buckner's statement without advising him "of his constitutional rights as defined in the Miranda case [Miranda v. Arizona, 384 U.S. 436]" (Co. Br. 21).

Those are specious arguments. In the first place, they are all based on the incorrect assumption that Buckner himself is the charged party in this case. The unfair labor practice charge was against an entity called United Engineering Company (R. 3), which is the trade name for F.J. Buckner Corporation, a corporation (R. 4, 7). Buckner himself was not mentioned in the charge, he was not named in the complaint which ultimately issued, he is not bound by the Board's order, except as an officer or agent thereof, and he is not the petitioner before this Court. Hence, no "inculpatory statement was made by the accused," because Buckner was not the accused. Nor did the



Board agent violate F.J. Buckner Corporation's right not to be compelled to testify against itself, because corporations have no such right. See, e.g., United States v. White, 322 U.S. 694. For this reason alone, the arguments made by the Company from page 11 to page 22 of its brief are totally inapposite.

Even assuming that Buckner is the accused in this proceeding, we submit that Field Attorney Spannier did not improperly induce him to make an inculpatory statement. Buckner's story of his interview with Spannier shows merely that Spannier at that time did not believe that he had uncovered any evidence to support the charge that Szczesniak had been discharged for an illegal reason. The thrust of Spannier's remarks, as related by Buckner at the hearing, was that Spannier had interviewed Union officials and the stewards in the plant, and that he, Spannier, had reached the tentative conclusion that the unfair labor practice charge was without merit and that he intended to recommend its dismissal. There is nothing in the record to show that what Spannier told Buckner at the beginning of their interview was not the truth. By no means can it justifiably be said that the statements made by Spannier "were tantamount to promises that the charge would not be prosecuted against Buckner" (Co. Br. 15). Spannier simply told Buckner his view of the merits of the charge; he did not offer to dismiss the charge as the quid pro quo for Buckner's statement. In the language of the Supreme Court in Shotwell Mfg. Co. v. United States, 371 U.S. 341, 348, upon which the Company relies in





its brief (p. 14), there was no "promise of immunity or leniency in return for a statement." <sup>11/</sup>

In any event, the Company's defense must fail because, insofar as Labor Board proceedings are concerned, there is no constitutionally protected right to remain silent. An unfair labor practice proceeding is not a criminal case. It is well settled that although the Board has wide discretion in devising remedies, its sanctions may not be punitive but must be limited to measures "which put aright matters the unfair labor practice set awry." Local 60, United Brotherhood of Carpenters v. N.L.R.B., 365 U.S. 651, 658 <sup>12/</sup> (Harlan, J., concurring). Given this limited sanction, it can hardly

<sup>11/</sup> Contrast the facts here with those in United States v. Denno, 259 F. Supp. 784 (S.D. N.Y.), which the Company also cites in its brief. There, the court found that a policeman's statements to a person "that the prosecution wanted and needed his help to convict another person<sup>7</sup>, that it 'wanted his statement only as a witness,' that 'no charges would be brought against him,' and that 'you will never go to trial in this case' were reasonably understood by petitioner as an assurance that in exchange for his statement as to events attendant upon and incidental to the homicide and assault he would not be prosecuted for any crime arising therefrom" (id., at 790).

<sup>12/</sup> Accord: Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 10 ("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes."); N.L.R.B. v. Teamsters and Allied Workers, etc., 313 F. 2d 655, 660 (C.A. 9); N.L.R.B. v. Plaskolite, Inc., 309 F. 2d 788, 790 (C.A. 6).



be said that one who admits the commission of unfair labor practices "incriminates" himself.

Moreover, the charged party or respondent in an unfair labor practice case can be compelled by the terms of the Act to testify and give evidence. Congress expressly provided in Section 10(b) that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . . ."

Thus, unlike in a criminal trial, the respondent in an unfair labor practice case can be called to the stand and examined as an adverse witness under Rule 43(b) of the Federal Rules of Civil Procedure.

In addition, under the terms of Section 11 of the Act, a charged party in an unfair labor practice case can be subpoenaed by counsel for the General Counsel and compelled to give evidence during both the pre-complaint investigation of the charge and the hearing before the Trial Examiner. Refusal to obey the subpoena subjects such person to enforcement proceedings in an appropriate district court and failure to obey the order of the district court is specifically declared punishable as contempt.<sup>13/</sup> If Buckner had not voluntarily agreed to give

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<sup>13/</sup> Although there is no right to remain silent as to the facts relevant to the unfair labor practice charge, if, during the course of a Board proceeding, a respondent is compelled to testify as to any matter which would subject him to criminal prosecution, he is entitled to immunity from such prosecution. Section 11(3). Nothing of this nature is involved herein.



the Board agent a statement, the latter could have compelled him to do so by subpoenaing him. O.T. Link v. N.L.R.B., 330 F. 2d 437, 440 (C.A. 4); N.L.R.B. v. United Aircraft Corp., 200 F. Supp. 48, 50 (D. Conn.), <sup>14/</sup>aff'd 300 F. 2d 442 (C.A. 2).

<sup>14/</sup> N.L.R.B. v. Adhesive Products Corp., 258 F. 2d 403 (C.A. 2), upon which the petitioner relies (Br. pp. 12-13), is wholly distinguishable. In that case, the court held that Jencks v. United States, 353 U.S. 657, was applicable to Board proceedings, and that a respondent was entitled, at an unfair labor practice hearing, to see an affidavit that the witness had previously given to the Board, in order to enable the respondent to cross-examine, and possibly to impeach the witness. Underlying the Adhesive Products decision, and the Board's acceptance of that decision in Ra-Rich Mfg. Corp., 121 NLRB 700, is the recognition that a respondent has the undoubted right, inter alia, to cross-examine witnesses who testify adversely to him at an unfair labor practice hearing and to attempt to impeach their credibility. See Jencks v. United States, supra, 353 U.S. at 667, 668-669. A respondent in an unfair labor practice proceeding would be seriously prejudiced by the inability to obtain such pre-trial statements prior to cross-examining such witnesses. Thus, there was reason for applying the doctrine first developed in the criminal law to administrative proceedings. However, as we have demonstrated above, there is no reason for incorporating into unfair labor practice cases the right of a respondent to remain silent, since the Act does not subject him to criminal penalties. The immunity provided by Section 11(3) of the Act is sufficient to protect a respondent's constitutional right





Since Buckner had no constitutional right to remain silent, it follows that his pre-hearing statement was not inadmissible under the rule of Miranda v. Arizona, 384 U.S. 436. That case holds that a statement "obtained from an individual who is subjected to custodial police interrogation" may not be admitted in evidence in a criminal proceeding unless before questioning him the officers inform him of his right not to speak and to consult with counsel. 384 U.S. at 440. That decision rested upon the need to preserve the right of an accused "under the Fifth Amendment . . . not to be compelled to be a witness against himself." Ibid.

Here, as we have already shown, the corporation, not Buckner, was "accused", and Board proceedings are civil, not criminal. Further, Buckner was not held in custody -- he was interviewed in his own office; and Field Attorney Spannier is not a police official. Even if possible criminal sanctions lurked in the background, Buckner's statement would have been admissible since it was freely given in the course of an administrative investigation when the investigator had no reason to foresee the possibility of a criminal proceeding. See Kohatsu v. United States, 351 F. 2d 898 (C.A. 9), cert. denied, 384 U.S. 1011. In any event, there is nothing in the record to show that Spannier did not tell Buckner that the latter had a right to refuse to give a statement and to have an attorney present. The matter simply was not raised at the hearing by the Company, so counsel for the General Counsel was never called upon to establish the point.

One last thing remains to be said about the Company's claim that enforcement of the Board's order should be denied because Buckner's pre-hearing statement was improperly obtained. Even assuming that the



Board agent committed some impropriety in securing Buckner's statement, there is no showing how the Company was prejudiced thereby. The damaging admissions Buckner made in his affidavit were willingly repeated by him and agreed to by the Company's counsel during the course of the hearing before the Trial Examiner. See Tr. 30, 32, 34, 35, 40, 42-43, 49, 53, 55-57. As a result, the evidence contained in the disputed statement is merely cumulative of other evidence in the record, and the Board's findings can be sustained even if the statement is totally disregarded. Under these circumstances, the company has suffered no prejudice and the Board's order is entitled to be enforced as it stands.

IV. THE ALLEGED LOSS OF COMPANY  
DOCUMENTS BY A BOARD AGENT  
DOES NOT WARRANT DENYING  
ENFORCEMENT OF THE BOARD'S  
ORDER

In its brief (p. 22) petitioner asserts that some documents in a file which it gave to a Board agent while investigating the case were never returned. The Company then claims that the missing papers bore on a "key issue" in the case -- whether Szczesniak filed verbal grievances after the last collective bargaining agreement was entered into -- and that they likely would have changed the Board's finding that he had not. Accordingly, the Company claims that the Board's order should not be enforced because of "the negligent or otherwise unexplained failure" of the Board to produce these documents (Br. p. 24).

This argument, like the ones relating to Buckner's statement, are wholly without substance. The record shows nothing about these alleged "missing papers" except that they pertained to the subject of grievances, they were in Szczesniak's handwriting with notations by Loy, and that the Board agent who purportedly took these documents has no recollection



of them at all (R. 143-146, 246-248). No effort was made at the hearing to disclose any more about the missing papers, and to establish in what way they would be relevant to the case. Petitioner's claim that the missing papers would likely change a key finding by the Board has absolutely no support in the record.<sup>15/</sup> Petitioner has the burden of showing in what way it was prejudiced. Mere speculation based on a hypothetical set of facts is not enough. Absent such a showing of prejudice, or that the Board agent was acting in bad faith, there is no justification for denying enforcement of the Board's order. Killian v. United States, 368 U.S. 231, 242; Dwight-Eubank Rambler, Inc. v. N.L.R.B., 380 F. 2d 141, 145 (C.A. 9); N.L.R.B. v. Seine and Line Fishermen's Union, 374 F. 2d 974, 981-982 (C.A. 9), cert. denied, -- U.S. -- , 66 LRRM 2370.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied, and that a decree should issue enforcing the Board's order in full.

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December 1967.

<sup>15/</sup> Indeed, the missing matters seem to be irrelevant, for they allegedly are written grievances filed by Szczesniak (Tr. 247). Since Szczesniak was discharged ostensibly because his grievances were made orally, rather than in writing, it is not apparent how written grievances filed by him would help the Company's case.





C E R T I F I C A T E

THE UNDERSIGNED CERTIFIES THAT HE HAS EXAMINED  
THE PROVISIONS OF RULES 12 AND 13<sup>+ 39</sup> OF THIS COURT,  
AND IN HIS OPINION THE TENDERED BRIEF CONFORMS  
TO ALL REQUIREMENTS.

Marcel Mallet-Prevost  
Assistant General Counsel  
National Labor Relations Board



No. 21,786

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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F. J. BUCKNER CORPORATION, dba UNITED ENGINEER-  
ING COMPANY,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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## PETITIONER'S REPLY BRIEF.

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FILED

FEB 29 1968

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MAR 4 1968



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No. 21,786  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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F. J. BUCKNER CORPORATION, dba UNITED ENGINEER-  
ING COMPANY,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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**PETITIONER'S REPLY BRIEF.**

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**I.**

**PRELIMINARY STATEMENT.**

Petitioner incorporates by reference herein as though set forth in full parts I, II, III and IV of its opening brief on file herein.

**II.**

**ADDITIONAL STATEMENT OF THE CASE.**

The union was consulted both before and after the discharge of Szczesniak [Tr. p. 246, lines 1-16]. The workers committee did meet and discuss the Szczesniak grievance [Tr. p. 224, line 3, to p. 225, line 20; p. 231, line 4, to p. 232, line 6]. An effort was made to inform member Szczesniak of the committee meeting [Tr. p. 232, line 6, to p. 233, line 4].

III.

ARGUMENT.

A. It Was Error for the Board and the Trial Examiner Not to Defer to the Decision of the Grievance Committee and to Conclude That the Board Was Not Deprived of Jurisdiction by Such Decision.

Petitioner seeks this Court to rule on a question on which it has not yet spoken. Both *NLRB v. Walt Disney Productions*, 146 F. 2d 44 (9th Cir. 1944) and *NLRB v. Tanner Motor Lines Ltd.*, 349 F. 2d 1 (9th Cir. 1965) involved cases where the issue was not before the Court.

In *Disney*, the grievance procedure had not been utilized. In *Tanner*, the employer did not attack the Board findings on the fairness of the grievance procedure.

It is Petitioner's position that the Board should defer to the decision of the persons concerned after the union, both before and after the discharge, agrees with the discharge, and a workers committee after discussion of the incident with the employer in conformance with the grievance procedure, also agrees that the discharge was justified under the contract.

*Lodge 734, IAM v. United Aircraft Corp.*, 337 F. 2d 5 (2d Cir. 1964) is the strongest case in support of the Board's position. In it the Court summarily dismisses the argument without case support that Petitioner here advances by stating that "The Courts ought not to transmute this Board policy into a rule of law. . . ."

337 F. 2d at 11.

It is precisely Petitioner's point that the Courts should transmute the Board policy into a rule of law in the circumstances of this case, and that such action should be taken in any case where it is clearly an abuse of the Board's discretion not to defer to the internal resolution of the dispute.<sup>1</sup> The decisions cited in Petitioner's Opening Brief encouraging speedy internal settlement of disputes clearly argue for such a rule.

**B. It Was Error for the Board and the Trial Examiner to Admit Into Evidence and to Consider the Affidavit of Buckner in Reaching Their Decisions That Petitioner Herein Was Guilty of Violations of 8 (a) (1) and 8 (a) (3), NLRA.**

The Board's position is (1) a corporation is the accused and not Buckner and (2) a Board proceeding is not criminal in nature thus, reasons the Board on the facts in this case, Buckner's (1) constitutional rights were not violated, (2) the corporation had no such rights to be violated and (3) nobody has such rights before the Board anyway.

The Board is incorrect in all particulars:

1. The precise nature of the constitutional rights of corporations and associations treated as quasi-corporations is set out by the Supreme Court in *Curcio v. United States*, 354 U.S. 118 (1957). Of course, corporate records may not be “. . . insulated from rea-

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<sup>1</sup>It is noteworthy that the arbitration submission agreement in the *Lodge 743, IAM* case was apparently separate and apart from a collective bargaining agreement. In the instant case, the grievance procedure was an integral part of the whole agreement. The Court should be less willing to deny the enforcement of one section of an agreement, thus upsetting the delicate balance of the entire agreement.

sonable demands of governmental authorities by a claim of personal privilege on the part of their custodian.”

354 U.S. at 122.

But, equally so, such officers “... may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers.”

354 U.S. at 124 (quoting from *Wilson v. United States*, 221 U.S. 361 (1912)).

Thus personal papers and personal testimony of such officers are subject to the protection of the Constitution. In this case we are dealing with a personal statement of a corporate officer. The Board would deny the rights of a considerable amount of people.<sup>2</sup>

2. The Board suggests that its proceedings are civil, not criminal. Petitioner has cited cases where constitutional rights have been recognized in a clearly civil case, and an administrative proceeding. The issue is whether or not criminal proceedings are *possible* against the person claiming privilege in any proceeding.

“The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judi-

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<sup>2</sup>In fiscal year July, 1956-June, 1966, there were 1,427,606 corporations which filed income tax returns. *Statistics of Income 1965, Corporate Income Tax Returns*, Internal Revenue Service Pub. 159, U.S. Government Printing Office, Washington, D.C. (1966). Assuming only one officer per corporation, the Board would still remove the rights of some one and one-half million people!



cial, investigatory or adjudicatory . . . it protects any disclosures which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*' (Emphasis supplied.)"

*In the Matter of The Application of Paul L. Gault*, ----- U.S. -----, 18 L. Ed. 2d 527, 557 (1967) (quoting from *Murphy v. Waterfront Commission*, 378 U.S. 52, 94 (1964).

It is noteworthy that in the *Gault* case, the Supreme Court was faced with a "civil" proceeding. It had no difficulty in applying the Fifth Amendment through the Fourteenth to the case. Where deprivation of liberty is threatened:

"To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."

18 L. Ed. 2d at 558.

Nor is the Fifth Amendment so limited. It reads in pertinent part:

". . . nor be deprived of life, liberty or property without due process of law . . ."

U.S. Const. Amendment V.

Of course, Buckner will be deprived of property (money) by the Board decree if enforced by this Court, and be placed in danger of being deprived of both property and liberty as well as pointed out below.

(a) Is It Reasonable That Buckner May Be Subject to  
a Criminal Prosecution?

The Board as yet has not been deprived of its powers to petition for criminal contempt. Against a corporation, the Board petitions to hold *its officers* in criminal contempt.

*NLRB v. Star Metal Mfg. Co.*, 187 F. 2d 856 (1951).

And when necessary in its view it petitions to *jail* the officer. It is sometimes successful.

"The National Labor Relations Board petitions for a writ of body attachment against respondent Stephen Vazzano, *president* and *managing agent* of respondent Savoy Laundry, Inc. (Savoy). The motion is granted." (Emphasis supplied).

*NLRB v. Savoy Laundry, Inc.*, 354 F. 2d 78, 79 (2d Cir. 1965).

It is thus eminently reasonable for Buckner to conclude that his statement, relied on by the Trial Examiner and Board in its decision, may subject him to proceedings even labeled criminal.

The fact, of course, is that even if criminal safeguards are instituted at that point in time, the damage is done, the contempt petition is based on the enforcement decree which is based on the Board decision and it, in turn, on evidence not properly considered and considerable in a criminal proceeding.<sup>3</sup>

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<sup>3</sup>Such evidence would not then be subject to exclusion by collateral attack on the enforcement decree or Board decision. *NLRB v. Latex Industries*, not reported in Federal Reporter, 53 LRRM 2458 (6th Cir. 1963) contempt proceeding for disobeying decree in *NLRB v. Latex Industries*, 307 F. 2d 737 (6th Cir. 1962).

The Board also argues that Section 11 of the NLRA gave the Board power to subpoena Buckner. That, of course, is so, but it hardly precludes the utilization of the Constitutional rights of the subpoenaed person. In fact, such a procedure allows for ready review of such a claim in face of a subpoena. LMRA, Sections 11(1), (2); see *American Cyanamid Company v. Sharff*, 309 F. 2d 790 (3d Cir. 1962). The immunity granted by Section 11(3) is illusory, at best, where criminal contempt proceedings are yet available to the Board. In any event, such a formal subpoena, better calculated to alert Buckner to the seriousness of this matter, was not utilized. Instead, the Board did what was excepted from the decision of this Court cited by the Board, *Kohatsu v. United States*, 351 F. 2d 898 (9th Cir. 1965). In that case:

“It is clear that all statements made and all documents delivered were voluntary acts of the appellant and were not induced by stealth, trickery or misrepresentation.”

351 F. 2d at 902.

In the instant case, the statement was obtained through statements of the investigator which were, at the very least, highly misleading.

To this point, this section of the reply brief has been in response to the brief from the Board, since the issues raised by the Board are well-advanced and well-thought. However, the real issue is perhaps best defined in the *Miranda* case:

“All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or fed-

eral—must accord to the dignity and integrity of its citizens.”

*Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

The fact still remains that the only way to prevent such governmental practices as are evident in this case it to deny the fruits of the practice.

As recognized in the *Gault* case, the due process clause of the Fifth Amendment should apply to certain “civil” proceedings. As recognized in the *Miranda* case, the real concern of the Court should be to protect citizens from an over-reaching government. It is precisely on these basic principles of Constitutional rights, due process and fair play that this Petitioner bases its case.

Dated: February 28, 1968.

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### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

THOMAS C. WATERMAN





















